

Nos. 15603-15604

United States
Court of Appeals
For the Ninth Circuit

CONVERSE TRUCKING SERVICE, a Corporation and
DONALD H. NOTEBOOM,

Appellants,

vs.

PACIFIC INTERMOUNTAIN EXPRESS CO.,
a Corporation,

Appellee.

SAMACK, INC., a Corporation,

Appellant,

vs.

PACIFIC INTERMOUNTAIN EXPRESS CO.,
a Corporation,

Appellee.

Transcript of Record
In Two Volumes

Volume II
(Pages 23 to 190)

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District of Oregon

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Appeal from the United States District Court for the
District of Oregon

In the United States District Court
for the District of Oregon
Civil No. 8508

CONVERSE TRUCKING SERVICE, a Corpora-
tion,

Plaintiff,

vs.

PACIFIC INTERMOUNTAIN EXPRESS CO.,
Defendant and Third Party Plaintiff,

vs.

DONALD H. NOTEBOOM,

Third Party Defendant and Counterclaimant.

Civil No. 8834

SAMACK, INC., an Oregon Corporation,

Plaintiff,

vs.

THE HOME INSURANCE COMPANY, a New
York Corporation; and PHOENIX INSUR-
ANCE COMPANY, a Connecticut Corpora-
tion,

Intervening Plaintiffs,

vs.

PACIFIC INTERMOUNTAIN EXPRESS CO.,
a Nevada Corporation,

Defendant.

Wednesday, March 20, 1957

Before: The Honorable Gus J. Solomon, Judge of
the above-entitled court and a jury.

Appearances:

MESSRS. DUANE VERGEER, and
CHARLES CROOKHAM,

Attorneys for Converse Trucking Service
and Donald H. Noteboom;

MR. JOHN GORDON GEARIN,

Attorney for Pacific Intermountain Ex-
press Co.; and

MR. ROBERT CLAPPERTON,

Attorney for The Home Insurance Com-
pany.

PROCEEDINGS

The Court: All right, go ahead.

Mr. Vergeer: Your Honor, we will call Mr. Noteboom.

∴ DONALD H. NOTEBOOM

was thereupon produced as a witness on behalf of the plaintiff, and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Vergeer:

Q. Will you state your full name, Mr. Noteboom? A. Donald H. Noteboom.

Q. And how old are you? A. Thirty-six.

Q. By whom are you employed?

A. Converse Trucking Service.

Q. And what is the nature of your employment?

(Testimony of Donald H. Noteboom.)

A. Line driver, truck driver, whatever you want to call it.

Q. Well, line driver, you say, what is the difference between a truck driver and a line driver?

A. Well, it's all the same actually.

Q. Well, what sort of traveling do you do with a truck?

A. Well, at the time of the accident I was driving from Portland to Klamath Falls.

Q. What sort of a run do you have now?

A. I am running to Grants Pass from Portland.

Q. How long have you been driving a truck before this [2*] accident occurred? A. 1941.

Q. Have you been more or less continuously employed as a truck driver since 1941?

A. Yes, I was self-employed from 1946 to '47, but almost the spring of '48, and then I have been employed by other trucking companies.

Q. About how many miles would you drive, normally, in the course of a month?

A. Oh, approximately 7,000 miles a month.

Q. About 7,000 miles a month, and at the time of this accident, by whom were you employed?

A. Converse Trucking Service.

Q. Now, what sort of a rig were you driving?

A. An International cab over.

Q. Can you describe that any further?

A. Well, it's a tractor that pulls a set of doubles. In other words, two trailers and——

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Donald H. Noteboom.)

Q. And that tractor, how many front wheels does it have? A. Two wheels.

Q. Two front wheels, how many rear wheels?

A. It had two. It's just a single axle.

Q. Just a single axle? A. Single drive.

Q. All right. And it has how many tires on the rear axle? [3] A. Four.

Q. Then the box you were pulling, what sort of wheels did it have, the first box?

A. The same as a tractor. It has four wheels on the first trailer, then there is the dolly and it has four wheels and then the end trailer has four wheels on it.

Q. You mean the second box?

A. Second box, yes.

Q. So each box actually has a single axle with four tires on it that are an integral part of the box?

A. Yes.

Q. And the forward part of the first trailer rests on the tractor; is that right? A. Yes, sir.

Q. And the forward end of the second trailer rests on a dolly? A. Yes.

Q. And that consists of a single axle with how many tires on each side?

A. Nine on each side.

Q. Well, for the whole rig, you mean?

A. Yes.

Q. Nine tires on each side for the whole rig?

A. Yes.

Q. All right. Were you familiar with this particular piece [4] of equipment?

(Testimony of Donald H. Noteboom.)

A. Yes, very familiar.

Q. How long had you been driving it?

A. Oh, I drove—I drove this particular rig for almost two years.

Q. That's before the accident, of course?

A. Yes.

Q. What sort of a power plant did it have?

A. 200 Cummins.

Q. That's a diesel? A. Yes.

Q. And 200 horsepower? A. Yes.

Q. About what time did you leave Portland before the accident?

A. Approximately five o'clock.

Q. About what time did the accident occur?

A. The accident?

Q. Yes. A. One-thirty.

Q. Is that A.M.? A. Yes.

Q. And you left Portland at five o'clock p.m.?

A. Yes.

Q. Did you make any stops?

A. Albany, Oakridge. [5]

Q. And did you make any stops there for the purpose of discharging any cargo? A. No.

Q. What was the purpose of those stops?

A. Albany I had coffee and in Oakridge I stopped and fueled and ate there.

Q. About how long did you stop in Albany?

A. Oh, at Albany about fifteen, maybe twenty minutes.

Q. And how about Oakridge?

A. I was there about an hour.

(Testimony of Donald H. Noteboom.)

Q. Now, as you traveled up the highway from Oakridge, what was the nature of the weather?

A. The weather was nice, it wasn't snowing or anything. It was cold.

Q. What condition—what was the condition of your equipment?

A. The equipment was in very good condition.

Q. You say it was cold, but the weather was clear; is that right? A. Yes, it was clear.

Q. Was there any snow on the road?

A. Yes.

Q. Was there any banks of snow alongside?

A. After you got higher up, yes.

Q. Well, when you approached the top of the grade there, how was the snow? [6]

A. Lots of snow.

Q. About how deep was it along the sides?

A. Oh, I'd—it was almost even with the top of the cab at the top of the hill.

Q. Almost even with the top of the cab?

A. Yes, at the top of the hill.

Q. All right. Now, how far past the top of the hill did this accident occur, approximately?

A. I'd just say five miles.

Q. And have you come down a very appreciable amount in altitude from the top of the hill to where the accident happened? A. Yes.

Q. Now, at the scene of the accident, is there any grade on the road?

A. There is just a slight downgrade, not enough that you even hardly notice it.

(Testimony of Donald H. Noteboom.)

Q. Did the snow blow at all; was it dry enough so that there was dust behind your truck?

A. Yes.

Q. Snow dust? A. (Witness nods head.)

Q. Now, how far apart, or how far away from you was the other vehicle with which you later collided when you first saw it? [7]

A. Well, he topped the grade, oh, it was quite a ways back; just as I came over the little grade he came over a hill on the other side, and it was, I imagine about a mile and a half or two miles apart.

Q. Was there anything in between you and the other vehicle? A. Not a thing.

Q. About how wide is the road at the scene of the accident?

A. Well, it was wide enough for two vehicles I know.

Q. Did they need to be graded at all?

A. Well, it seemed to be—it had snowed up there the Sunday before real hard, because I had come over it then, but as far as the road, it was in pretty good condition right there. A lot of snow.

Q. Can you—well, strike that. All right. Now, as the vehicles approached each other, what part of the highway were you driving on?

A. I was on my right-hand side of the road.

Q. How close to the right-hand bank of snow were you driving?

A. I was almost touching the bank.

Q. As the other vehicle approached you, where was it with reference to the road?

(Testimony of Donald H. Noteboom.)

A. He was coming fine, coming along real fine.

Q. On his own side?

A. On his own side of the road. [8]

Q. About how fast do you think he was going?

A. Approximately thirty-five.

Q. And about how fast were you going?

A. About thirty-five miles also.

Q. Well, now, your lights were on, were they?

A. Yes.

Q. And the lights on the other truck were on also?

A. Yes.

Q. Where is the battery box on your truck?

A. The battery box is on the left-hand side just underneath the fender on my side.

Q. Outside the cab?

A. Outside the cab.

Q. I can't hear you. A. Outside the cab.

Q. You know, if the last juror over here doesn't hear you, you might as well not testify. We have to all hear you, and are your lights operated from your battery set?

A. Yes.

Q. Now, as the vehicles approached each other, as you have already testified, you were approaching each other and each was on his own side of the road. Was there any reason at that point—was there anything at that point visible to you that gave you any concern?

A. No, sir, none at all. [9]

Q. All right, then what happened?

A. Well, as I approached it, all of a sudden it seemed like he either got scared or his front hooked

(Testimony of Donald H. Noteboom.)

in some snow or something and into the snowbank he went on the right side and the next thing I knew, there was the back end of his tank right in my face.

Q. The back end of his truck?

A. The back end of his truck.

Q. And what happened then?

A. Well, the next thing I remember I seen steam coming up, and I was trying to get out of the truck.

Q. Where was your truck then?

A. Well, it was setting on the other side; I don't know just exactly the direction, but it had turned this way (indicating) and it was actually headed back the way I was coming.

Q. That's the next thing you recall?

A. That's the next thing I recall.

Q. At that time, were you conscious of anything about the truck that was different?

A. Well, yes, there was no windshield in it. It was kind of cold.

Q. Well, how about the door on your left?

A. It was all crumpled up.

Q. How about your steering wheel? Where was it? [10]

A. It was in my stomach.

Q. And how about your feet, were they free?

A. My left one was hooked in behind the clutch.

Q. Which foot? A. The left one.

Q. Your left foot, and were there any lights on at that time?

A. Well, I seen truck lights. About all I seen was a set of headlights.

Q. You saw a set of headlights?

(Testimony of Donald H. Noteboom.)

A. Yes, where I was sitting heading back the way I was coming, there was a set of headlights there.

Q. At that time, did you see the truck with which you had collided?

A. Yes, it was off to the left—off to the right, I mean, I was sitting there, but I didn't see much about it. I was too concerned with getting out of there.

Q. Well, what did you do; were you conscious of any pain at all?

A. Well, I seen steam coming up. That's the first thing I remember and then I heard somebody say, "My God, he is still in the truck."

Q. And what did you do?

A. Well, I proceeded to try, I guess, to try to get out of there. The right door was stuck. I couldn't get it open. [11]

Q. That was the right-hand door?

A. The right-hand door.

Q. You were able to extricate yourself from behind the wheel?

A. Yes, I moved it up off of me.

Q. You moved it up, did you?

A. Yes, I did.

Q. And then how did you get out of there?

A. Well, I kicked the door open. It seemed to be stuck, and I just hauled off and kicked it. I guess I was a little bit scared.

Q. You were scared?

(Testimony of Donald H. Noteboom.)

A. I thought the thing was on fire and here it was steaming.

Q. And did anyone help you get out of the truck?

A. Well, I just—as I was going out the door there was a man come up to the snowbank on the right-hand side there, but I don't know who it was or anything like that.

Q. Then what happened to you?

A. Well, then they put me in a P.I.E. rig that had come from behind me and they put me in the cab to keep me warm.

Q. What side of the cab do you drive that truck from?

A. The left side.

Q. And is that a cab over the motor?

A. Yes.

Q. And that's where you were sitting at the time of the [12] accident, I suppose?

A. Yes.

Q. Did you make any inspection of the truck or position of the vehicles on the highway at that time?

A. When I was sitting in this other truck?

Q. Well, at any time at the scene of the accident?

A. Well, at the scene, but—yes, I was at the scene of the accident, but I was sitting on this other truck trying to keep warm, and I, well, more or less looked the situation over then.

Q. It was out in front of you, is that it?

A. That's right.

Q. Were the headlights on this truck that you

(Testimony of Donald H. Noteboom.)

were sitting in turned on? A. Yes.

Q. And you say that was a P.I.E. truck?

A. Yes.

Q. Do you know what the markings on that truck were?

The Court: Which one are you talking about?

Q. (By Mr. Vergeer): The truck he was sitting in, your Honor. He was sitting in this truck to keep warm after the accident.

A. The markings on it?

Q. Yes, do you have any idea what it said on the side of that truck you were sitting in? [13]

A. Well, yes, it was a conventional—I don't know whether it was a K.W. or Peterbilt. No, it was a K.W. I am sure.

Q. Well, that's all right. Just skip it. Did you see the truck then with which you had collided?

A. Yes.

Q. What kind of a truck was that?

A. That was a Kenworth, cab over.

Q. Did it have any markings on it?

A. Yes, you mean—

Q. Pacific Intermountain?

A. Yes, Pacific Intermountain Express. Just at that time they were changing over, some of them was West Coast and some of them was P.I.E.

Q. Now, were you at that time, when you were sitting in this truck, conscious of any injuries at all?

A. You mean in the cab where I was getting warm?

(Testimony of Donald H. Noteboom.)

Q. Yes.

A. Well, that's where I found my knee was all banged up.

Q. Were you conscious of any injuries to your head at that time?

A. Well, a little bit woozy is all.

Q. And you found your knee was injured?

A. Well, my hand, that's the original thing I really noticed, but I found out afterward I was sitting in the cab [14] there and my knee was hurting because I couldn't move the darn thing very good.

Q. And what was wrong with your hand?

A. It was bleeding, had blood all over it.

Q. That's what you could tell about it?

A. That's all I could tell. It had been chewed up a little bit.

Q. And anything else about you that you noticed wrong with you at that time?

A. Well, my stomach was hurt.

Q. How did you leave the scene of the accident?

A. In an ambulance.

Q. About how long after the accident was that?

A. It was quite awhile. I'd judge an hour and a half. I don't know just exactly how long it was.

Q. And from there where did you go?

A. Went down to Oakridge and they stopped there and took me in and was going to treat me with first aid, more or less, and they put blankets all around me trying to get me warm, and from there on they took me into Eugene to the hospital.

Q. Who took care of you at Eugene?

(Testimony of Donald H. Noteboom.)

A. Dr. Teller.

Q. And how long did you stay at the hospital; first of all, what time did you arrive there, about?

A. At the hospital?

Q. Yes. A. Approximately five a.m.

Q. And when did you leave the hospital?

A. The next day.

Q. At about what time?

A. About eleven o'clock in the morning, somewhere around there, eleven—I don't remember just exactly how long.

Q. Well, the day after you—the day after you arrived there anyway? A. Yes, it was.

Q. What was done for you there?

A. Oh, X-rays, sewed me up.

Q. Sewed you up, what did they sew up?

A. My knee, that's—and my hand, out there they didn't sew it. They just laid it all back together and bandaged it up.

Q. How about your head; was anything done for that?

A. No, they took an X-ray, I guess, and that's all they did.

Q. And were you given an anesthetic for sewing your knee up? A. Yes.

Q. A general anesthetic or local?

A. General. [16]

Q. Took you to surgery; is that it?

A. Yes.

Q. When you left the hospital, what sort of condition were you in?

A. Oh, pretty good, except my knee was all.

(Testimony of Donald H. Noteboom.)

They had to put a kind of a cast on it, so I couldn't use it.

Q. Sort of a splint?

A. Well, it wasn't a splint. It was a cast.

Q. It was a cast?

A. Plaster and that plaster stuff, whatever it is.

Q. How long, from where to where did that cast extend?

A. Well, from here (indicating) up to here (indicating).

Q. And how long did you wear that plaster cast?

A. Almost two weeks.

Q. Who took it off? A. Pardon.

Q. Who took it off?

A. He did, Dr. Teller.

Q. In Eugene? A. In Eugene.

Q. When you left the hospital, where did you go? A. I came home, here in Portland.

Q. And then did you see the doctor again?

A. Yes, I drove back down to Eugene to see him.

Q. You drove down? [17] A. Yes.

Q. With your stiff leg?

A. Yes, with one leg.

Q. And about how long after the accident was that when you went back down there?

A. That was about, I think it was eight days after the accident.

Q. How many?

A. Eight days after the accident, or after I left the hospital.

(Testimony of Donald H. Noteboom.)

Q. At that time, he didn't take the cast off?

A. No, he took it off and put another—oh—what do you call it—wrapped it all up this time. It was all underneath here (indicating), and it held it so the knee would be opened to heal better.

Q. Your knee would be open to the air?

A. More or less, yes.

Q. And then did you go back to Portland?

A. Yes.

Q. And how long was it before you went down again?

A. The 20th, or 19th, because then I drove on down to Coos Bay.

Q. I beg your pardon?

A. It was the 19th or 20th.

Q. You will have to speak up. It's very hard to hear you back here. You went back down again, did you? [18]

A. The 19th or 20th, yes.

Q. Did you drive down? A. Yes.

Q. And what did the doctor do for you that time? A. He took the bandage off then.

Q. And left it off? A. Yes.

Q. How was your knee at that time?

A. Well, it was pretty sore.

Q. Were you able to bend it?

A. Yes. I could bend it a little bit, not very much, but it would pull in there if I done it too much.

Q. How was your elbow at that time?

A. Well, it was all right except there was—I just didn't want to bump it.

(Testimony of Donald H. Noteboom.)

Q. And any other injuries?

A. Oh, my hand.

Q. How was your hand by that time?

A. It was healing pretty good.

Q. How about your stomach?

A. A little bit sore. I was kind of black-and-blue.

Q. Now, Mr. Noteboom, when did you go back to work?

A. It was the 30th or 31st. I don't remember just how long it was.

Q. Well, how long were you off work as a result of this [19] accident?

A. It was approximately—well, I know I missed ten trips.

Q. Ten trips? A. Yes.

Q. Are you paid by the trip?

A. No, sir, more or less divisions. We get a division in running to Klamath Falls and a division running back. That's one trip, and I missed ten of those.

Q. Well, are you paid by divisions?

A. Yes.

Q. All right, for each trip then one way, you are paid? A. Yes.

Q. So you missed twenty divisions; is that it?

A. Yes.

Q. And how much are you paid?

A. Well, here we go again. It's a division and a half from Portland to Klamath Falls, less what we call—or actually it's just a straight run and they pay \$27.60.

(Testimony of Donald H. Noteboom.)

Q. Well, how much income did you lose by reason of your inability to work? I think that's what we'd better ask you.

A. Well, it was approximately about \$540.

Q. \$540? A. Yes.

Q. All right. You didn't quite lose a month's work? [20] A. Not quite.

Q. About four weeks actually?

A. No, it was just a couple of days less than four weeks.

Q. But figuring the trips that you lost, you lost \$540 in wages? A. Yes.

Q. How have you been getting along, Mr. Noteboom, since the accident from the point of view of the injuries that you sustained there?

A. Well, I can't get down on my knees or bump my knee at any time. It's sore. It will probably get over it. I don't know, and by golly I have had headaches.

Q. You have had headaches? A. Yes.

Q. And did you ever have headaches before the accident?

A. I had a sinus headache maybe once in awhile, not those sharp pains going to my head.

Q. What kind of headaches do you get now?

A. I got a sharp pain in there, and it might be there for five minutes and it will go away and my head will hurt a little bit, but I don't know what kind of headaches you'd call them.

Q. Well, can you indicate the pain, where it is in your head?

(Testimony of Donald H. Noteboom.)

A. Right along this side here (indicating) and along the top of my head. [21]

Q. So your right side you are indicating?

A. That's right, right side.

Q. Does that interfere with your work?

A. No, I haven't let it.

Q. Do you take anything for it?

A. No, I went down and got glasses to see if that would help, but it didn't help.

Q. Did you wear glasses before? A. No.

Q. Do you wear glasses now?

A. No, my eyes are all right.

Q. Again, I will have to remind you to speak up.

A. I am sorry.

Q. Are those headaches improving any?

A. Yes, they seem to be.

Q. How often do you have them?

A. Oh, you never know. I might get one in ten minutes from now, and it might go for a couple of days and not even have any kind of a pain.

Q. But you have one at least every couple of days? A. I have had one every couple days.

Q. How about the bruise on the back of your head; did that disappear?

A. Yes, it disappeared.

Q. Is that perfectly all right now? [22]

A. Yes, it's a little bit sore right on top. There is a dip in there or something, whatever you call it.

Q. Going back to the scene of the accident, Mr. Noteboom, what side of the road were you on when the collision occurred?

(Testimony of Donald H. Noteboom.)

A. I was on the right side of the road.

Q. And the cabs passed each other without any trouble, didn't they? A. Pardon me?

Q. The cabs of the two trucks passed each other without any trouble?

A. Well, I wouldn't say that.

Q. Well, there was no collision between the front end of your truck and the front end of the tanker?

A. Well, he was off in the snowbank.

Q. Yes, that's right.

A. But my cab wasn't in very good condition.

Q. No, your cab was wrecked. I understand that. Well, just a minute——

A. Well, you said the two cabs.

Q. No, no, what I had reference to was the two cabs passed each other before the impact without interference; is that right? A. Yes.

Q. And then your cab was smashed by the rear end of the tanker that it collided with? [23]

A. (Witness nods head.)

Mr. Vergeer: Now, I wish the bailiff would, your Honor, hand the pictures of the cab and the tractor to the witness, please?

Mr. Gearin: You mean our pictures, counsel?

Mr. Vergeer: Well, our pictures.

Mr. Gearin: I haven't seen those yet. If those are the same, I have no objection to any of the photographs being received in evidence if they are the ones that counsel has showed me.

Mr. Crookham: There are two series there.

(Testimony of Donald H. Noteboom.)

Mr. Vergeer: I think they are on the table. Will you hand these exhibits to the witness, please?

(Photographs handed to witness.)

Q. (By Mr. Vergeer). You are now being handed exhibits marked Nos. 3-A through G and Exhibits Nos. 10-A through F, except C. Will you take each separate picture and read the exhibit number on the back of it and tell the jury then what that picture shows?

A. This is Converse Exhibit 3-A. You don't want the number?

Q. Yes. A. 8508.

Q. No, just 3-A.

A. This is a picture of the P.I.E. tanker facing with [24] the P.I.E. panel sitting in the front of it.

Q. All right, that's taken at the scene of the accident? A. Yes.

Q. Does that show the damage to the tanker?

A. No, it doesn't show the tanker because the P.I.E. panel is sitting in front of it.

Q. It shows the front of the tanker?

Mr. Gearin: Will you explain to the jury that those photographs were taken the next morning?

Mr. Vergeer: The daylight pictures were taken the next morning, certainly, we will agree to that.

The Witness: This is Converse Exhibit 3-B; it's a picture of the Converse rig. It's laying over in the snowbank pretty much.

Q. (By Mr. Vergeer): Converse rig?

(Testimony of Donald H. Noteboom.)

A. Yes, the tractor and one trailer.

Q. That's the tractor you were driving?

A. Yes.

Q. All right.

A. This is Converse Exhibit 3-C. This is evidently a picture of the trailer, the last trailer.

Q. The last trailer?

A. Yes, sitting by itself here.

Q. Yes, part of your equipment there?

A. Yes. This is Converse Exhibit 3-E and it's a picture [25] of the P.I.E. tanker being hoisted with a wrecker.

Q. Does that show the damage to the tanker?

A. Yes, with the damage on the back of the tanker.

Q. Is that the way it looked?

A. Pardon me?

Q. Is that a fair representation of the way it looked at that time? A. Yes.

Q. All right.

A. Converse Exhibit 3-F, and it is the trailer that was hooked onto the tractor.

Q. That's the Converse trailer?

A. Yes, the first trailer.

Q. I see, and that's part of your equipment?

A. Yes.

Q. And does that show the damage to it?

A. Just the front part very slightly, not all of it.

Q. All right.

A. Are you sure that's one of them?

(Testimony of Donald H. Noteboom.)

Q. I don't know. You have it there. I haven't.

A. Converse Exhibit 3-D, there is no name—oh, yes, there is a name. It's a Converse trailer.

Q. If you can't recognize that picture, why, that's all right. You just say you can't.

A. I don't remember of any of the back of it being out. [26] This has the whole back end of the trailer out.

Q. Yes, that's a picture apparently taken at the scene of the accident? A. Yes.

Q. And that's the back of a Converse trailer there? A. Yes.

Q. All right.

A. Samac, Inc., Exhibit 10-F, it's a picture of the cab, and it was taken down here by Mr. Sadoff's shop.

Q. And is that a fair representation of the way the cab looked after the accident? A. Yes.

Q. Very well.

A. Samac, Inc., Exhibit 10-E, it's also a picture of the tractor and of the first trailer.

Q. Is that a fair representation of it?

A. Yes, sir. Samac, Inc., Exhibit 10-D, same thing, tractor and first trailer.

Q. Very well.

A. Samac, Inc., 10-B, it's just the cab close up. It's—the trailer is there. You can see the front part of it. Samac, Inc., Exhibit 10-G, and this is at the scene of the accident. It's also of the cab and the front end of the trailer.

Q. Right at the scene of the accident? [27]

(Testimony of Donald H. Noteboom.)

A. Yes, sir.

Q. All right, fine.

A. And this is the Samac, Inc., Exhibit 10-A, and it's a picture of the tractor.

Q. There was one picture there that was taken without any damage to it—that's the one—is that a fair representation of the way your leg looked before the accident? A. Yes.

Q. Very well, we will offer the pictures, your Honor.

Mr. Gearin: No objection, your Honor.

The Court: Admitted.

(Whereupon, photographs previously marked Converse Exhibit Nos 3-A through G and Samac, Inc., Exhibits Nos. 10-A through F, except C, were received into evidence.)

Mr. Vergeer: We would like the jury to have an opportunity to view those pictures, your Honor.

The Court: Go ahead with your witness.

Q. (By Mr. Vergeer): I have a couple of questions, your Honor. Do you have, by the way, can you show to the jury—do you have any scars as a result of this accident on your knee? A. Yes.

Q. I would ask permission, your Honor, to be permitted to show this to the jury, to show the extent of the injury.

The Court: All right. [28]

Q. (By Mr. Vergeer): Will you raise your trouser leg, please? Can you raise your knee any?

(Testimony of Donald H. Noteboom.)

And that was left by the cut across the knee; is that right? A. Yes.

Q. As a result of the accident?

A. (Witness nods head in the affirmative.)

Mr. Vergeer: You may inquire.

Cross-Examination

By Mr. Gearin:

Q. Mr. Noteboom, when were you first contacted about filing your lawsuit against Pacific Intermountain Express?

Mr. Vergeer: I think that's irrelevant, your Honor.

The Court: Objection sustained.

Q. (By Mr. Gearin): Mr. Noteboom, you were going thirty-five miles an hour at the time you approached the scene of the accident? A. Yes.

Q. Could you be going as fast as forty-three miles an hour? A. No.

Q. All right. Did you have a tachograph or speedograph on your truck? A. No.

Q. Isn't it a fact that it is the policy of Converse Trucking Service not to have such a device on their trucks?

Mr. Vergeer: Just a moment, your Honor, I would object to that on the ground that it's entirely immaterial in the [29] first place, and in the second place, I think that it's improper for counsel to even ask the question, and he knows it's immaterial.

The Court: You mean—wasn't the question——

(Testimony of Donald H. Noteboom.)

Mr. Vergeer: What the policy of Converse, I believe he said, what the policy of Converse was with reference——

Mr. Gearin: Not to have those on their rigs.

Mr. Vergeer: Not to have a tachograph on their rig. I can't see, your Honor, how it has anything to do with it whether there was one or not.

The Court: Objection sustained.

Q. (By Mr. Gearin): What is a tachograph, Mr. Noteboom?

A. Well, a tachograph is a revolution of the motor.

Q. And what is a speedograph?

A. It's the speed you are going.

Q. And will you agree with me that a speedograph in a motor vehicle will indicate, if working properly, the speed at which the motor vehicle is going at any given hour, the time of a stop and the length of the stop? A. Yes.

Q. All right. You saw the P.I.E rig approaching you approximately a mile away?

A. Approximately, yes.

Q. You were going downhill?

A. Slight grade. [30]

Q. You left Portland at about five o'clock in the afternoon and the accident happened about three o'clock the following morning?

A. One-thirty, as I recall.

Q. One-thirty. Now, there was no other vehicles in sight, as you recall, as you approached the scene

(Testimony of Donald H. Noteboom.)

of the accident, other than the vehicle which was approaching you and that was the P.I.E. tanker?

A. The P.I.E. tanker.

Q. When you were approximately 60 or 75 feet apart, the front end of the P.I.E. tanker nosed to its right and into the snowbank?

A. Yes, sir.

Q. And at that minute you looked up and the end of the tank was in your face?

A. Yes, sir.

Q. The road was narrow at that point?

A. Well, the State Highway had plowed it.

Q. Would you say that the road was narrow?

A. A little.

Q. Now, you were at the hospital just overnight at Eugene? A. Yes.

Q. All right. And the next morning your boss, Mr. Sadoff, came to get you?

A. Mr. Sadoff did, yes. [31]

Q. Mr. Sadoff, your boss, came to get you, did he not?

A. I worked for the Converse Trucking Service.

Q. Do you recall your deposition taken in the office of your attorney on October 30th of last year?

The Court: Well, what is the dispute here now?

Mr. Vergeer: The question of whether Mr. Sadoff is his boss or not, your Honor.

The Witness: I have called him boss for years.

Q. (By Mr. Gearin): When we took your deposition, you referred to Mr. Sadoff as your boss?

A. Well, I said "boss." yes.

(Testimony of Donald H. Noteboom.)

Q. Now, you have been working steady since the accident? A. Yes.

Q. You have missed no time?

A. Just the time after the accident there.

Q. All right. And you haven't had any treatment for your headaches, I take it?

A. I went and got glasses, that didn't help.

Q. Well, you don't wear them?

A. They don't help.

Q. Now, your attorneys sent you to see Dr. Davis? A. Yes.

Q. He didn't treat you?

A. He examined me.

Q. All right. Now, as you approached the scene of the [32] accident, there was snow on the highway in front of you? A. Yes, sir.

Q. And there was snow on both sides?

A. Yes.

Q. And so would you agree with me that it was difficult for you to determine where the center of the main traveled portion of the highway was as you approached the accident's scene?

A. You're talking about a yellow line——

Q. I am talking about the center of the main traveled portion?

A. Yes, down there on the side of the road——

Q. As you approached the scene of the accident, will you tell us whether or not it was difficult for you to ascertain where the center of the main traveled portion of the highway was?

A. No, sir.

(Testimony of Donald H. Noteboom.)

Mr. Gearin: All right. I have no further questions.

Redirect Examination

By Mr. Vergeer:

Q. Mr. Sadoff—pardon me. Mr. Noteboom, I think you have testified by whom you were employed at that time?

A. Yes, Converse Trucking Service.

Q. Yes, were you employed at that time by Mr. Sadoff?

A. No, I drive his tractor, all Converse Trucking Service [33] does the hiring and firing and I work for them.

Q. And they pay you? A. Yes.

Q. And you do as they tell you? A. Yes.

Q. This was all at the time of the accident?

A. Pardon me?

Q. All I am asking you is at the time of the accident that's where we are talking about?

A. Yes.

Q. And you are still working for Converse Trucking Company, aren't you? A. Yes.

Q. Are you driving one of Mr. Sadoff's tractors?

A. Yes.

Q. You are, and do they tell you what to drive?

A. Yes, sir.

Q. That is, I am referring to Converse, tell you what to drive? A. Yes, sir.

Q. And where to go? A. Yes.

Q. And that was so at that time?

(Testimony of Donald H. Noteboom.)

A. Yes, sir.

Mr. Vergeer: That's all. [34]

Recross-Examination

By Mr. Gearin:

Q. One more question. You were hired by Mr. Sadoff, were you not?

A. I was hired by the Converse Trucking Service.

Q. When you first started driving Mr. Sadoff's trucks the first time, you were hired by Mr. Sadoff; weren't you?

A. Yes, it was before—oh, this was a long time ago.

Q. Would the answer to my question be that you were hired by Mr. Sadoff to drive that rig with the name Converse on it?

A. Now, wait a minute, I am confused here. I think that's a double question.

Q. All right, I will ask it again. Were you hired by Mr. Sadoff?

A. The first time I went to work for Converse, yes, sir, but then I left there and was gone away from there over a year and then I came back to work again.

Mr. Gearin: That's all the questions I have.

The Witness: And I worked for Converse.

Mr. Gearin: And that was before this accident?

The Witness: Oh, yes, way before.

Mr. Vergeer: That's all.

(Testimony of Donald H. Noteboom.)

Mr. Gearin: May I make an offer of proof in the absence of the jury, your Honor.

The Court: Ladies and gentlemen, you are now excused [35] until a quarter of two. Will you please return at that time. Everyone remain seated until the jury has left.

(Whereupon, the jury was excused.)

(Whereupon, the following proceedings were had in open court out of the presence of the jury:)

The Court: Go ahead.

Mr. Gearin: Mr. Noteboom, when were you first contacted about filing a lawsuit against Pacific Intermountain Express?

Mr. Vergeer: I object——

The Court: He is making an offer of proof.

Mr. Vergeer: I would like to know what counsel wants to prove.

The Court: I don't understand it myself.

Mr. Gearin: Do you want me to say it before the witness answers, your Honor?

The Court: Sure, I don't care.

Mr. Gearin: I'd rather have the witness do it. All right, did they tell you that you ought to file a lawsuit against Pacific Intermountain Express?

The Witness: Well, in a way, and in a way not.

The Court: All right.

The Witness: I have got a mind of my own.

Mr. Gearin: The purpose of this, your Honor, is that the complaint was filed within, I think, twenty-

four or [36] forty-eight hours after the accident, before the participants of the accident ever contacted Converse Trucking Service, and it will be our position, and I think the proof of the fact is that it was filed for the purpose of adding to the case here.

Mr. Clapperton: May I say, that the initial record was filed by Converse and then Mr. Gearin brought Mr. Noteboom in as a third party defendant in this case.

Mr. Gearin: That's correct because I knew he was going to file.

The Court: Well, how long after the accident did you file a case?

Mr. Gearin: It was some considerable period of time after we filed a counterclaim, your Honor, and then at that time we brought in Mr. Noteboom and there was also a suit filed by him in which he took a voluntary nonsuit.

The Court: You mean there was a case filed within a short time, all sorts of cases are filed——

Mr. Gearin: No, the Converse case was filed in court, your Honor, a day or so after the accident and then Mr. Noteboom filed and we filed a cross-complaint or counterclaim. We wanted to bring him in, and he filed a case and that's the reason I am going into this now, is that he was asked to file this case just to put the pressure on us.

The Court: Well, I want to say in my view it is [37] absolutely immaterial.

Mr. Gearin: Very well, sir.

The Court: And I think likewise the amount of the request for damages is likewise immaterial. If

you expect to get any comfort about that, I am going to comment on the testimony. You bring up the amount of damages and then you want to comment on the size when you are very well acquainted with our rules which do not permit a person to comment upon that.

Mr. Gearin: I brought it up, and I inquired first of your Honor, you know.

The Court: Yes, I know that.

Mr. Gearin: Because of the——

The Court: You know the rules here, that if he should get \$40,000 I would permit him to amend the complaint to make it conform with the proof. All right, recess until a quarter to two.

(Whereupon, a short recess was taken.)

The Court: Call your next witness.

Mr. Gearin: Officer Hazelwood, please. Mr. Crookham, will you get him? He is right outside the door.

The Court: Call your next witness.

Mr. Vergeer: I called Officer Hazelwood.

The Court: Call another witness then.

Mr. Vergeer: All right. He was my next witness. That's Officer Taylor. Do you want to take the stand then, Officer Taylor? [38]

HAROLD L. TAYLOR

was thereupon produced as a witness on behalf of the plaintiff, and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Vergeer:

Q. Mr. Taylor, what is your business, sir?

A. I am an Oregon State policeman.

Q. And how long have you been engaged in that business? A. Three years, six months.

Q. And were you engaged in that occupation last March; that is in 1956? A. Yes, sir.

Q. And what was your detail at that time?

A. I was on patrol from Oakridge east on Highway 58 to Crescent Lake Junction.

Q. All right. From Oakridge east, do you mean from Oakridge toward Klamath Falls?

A. Yes, sir.

Q. And your patrol would take you up to the Crescent Junction and then you would go back; is that it? A. Yes, sir.

Q. How long had you been patrolling that area?

A. Three years and about two months.

Q. I take it then that you are familiar with that road both in summer and winter? [39]

A. Yes, sir.

Q. In the course of that time, have you had occasion to investigate any accidents that happened on that road? A. Yes, several.

Q. And you're experienced and trained in the investigation of accidents, are you?

(Testimony of Harold L. Taylor.)

A. Yes, sir.

Q. Now, Mr. Taylor, did you have occasion to investigate an accident involving a Converse truck and train, I might say, and a Pacific Intermountain Express tanker and trailer?

A. I assisted on the investigation.

Q. And that was at what time; I mean, what date? Do you recall whether that was March 7th, last year?

A. Yes, sir.

Q. About what time did you reach the scene of the accident?

A. Two-twenty a.m.

Q. And when you arrived, what did you find there?

A. I found—you mean with relation to the accident?

Q. Yes.

A. Yes. A Converse set of doubles and a Pacific Intermountain Express had collided with one another. The tractor of the Converse set of doubles which was going—apparently was going east—had come back around and forming a—well, you might say a “U” shape with the first trailer blocking the highway. The third trailer which was the front of—[40] which was close to the berm or the side of the snow and the rear right side of it was out into the traveled portion of the highway.

Mr. Vergeer: I wonder, your Honor, if we might use the blackboard?

The Court: Go ahead.

Q. (By Mr. Vergeer): We will erase the diagram that's on it. Will you step down here, please.

(Testimony of Harold L. Taylor.)

Officer Taylor? I will hand you a piece of chalk. First, I will ask, is the road straight?

A. Yes, sir.

Q. My lines probably aren't straight, but they are as close as I can practicably draw them. Now, again, how would you like to have this; Klamath Falls at the top or the bottom?

A. It doesn't make any difference.

Q. And Eugene this way (indicating)?

A. Yes, sir.

Q. I will hand you the piece of chalk. First of all, at that time, did you see the pavement?

A. No, sir.

Q. There was snow, was there?

A. Yes, packed snow.

Q. Was the road—did it have a hard traveling surface on it? [41]

A. Yes, it was packed hard.

Q. Was there any snowbanks?

A. Yes, sir.

Q. And about how far apart were the snowbanks?

A. As I recall from a diagram, I think it was 23 feet, 8 inches.

Q. Between the snowbanks? A. Yes, sir.

Q. Is that about what you recollect them being from your personal recollection? A. Yes, sir.

Q. All right. Do you want to put that on there somewhere? All right. Can you tell us how wide either of the two trucks were? A. No, sir.

(Testimony of Harold L. Taylor.)

Q. Are you familiar with the width of a truck of that kind?

A. Yes, somewhat, it's roughly 80 inches or maybe more. I don't recall exactly how wide the truck is.

Q. Eight feet is the limit—

Mr. Gearin: We will stipulate that they were both 8 feet wide.

Q. (By Mr. Vergeer): They are both 8 feet wide, yes. Now, will you draw a line there—I have drawn two lines over on the blackboard and with those I intend to indicate the edge of the road, that is, the snowbanks on either side [42] and you have written on there, now, the distance of 23 feet, 8 inches. Will you now draw, to the best of your recollection, the position of the Converse rig when you arrived there? A. Yes, sir.

Q. I would urge you to try to draw them about in proportion, if you can, the general size.

A. Yes, sir.

Q. All right. Now, will you mark those No. 1, 2 and 3? A. That is front to rear.

Q. Well, if you wish. Now, am I right in saying that you have drawn a figure marked No. 1 with a pointed end on it, which along it we have drawn the top of the highway toward Klamath Falls?

A. Yes, sir.

Q. And you have drawn No. 1 pointed toward Eugene, and on the left side of the highway as we look at it? A. Yes, sir.

(Testimony of Harold L. Taylor.)

Q. And No. 2 you have drawn as being right square across the road?

A. As I recall it, it was approximately that way.

Q. And No. 3, facing more or less toward Klamath Falls and toward No. 2?

A. Yes, sir.

Q. And on the right side of the road?

A. Yes, sir. [43]

Q. For Klamath Falls-bound traffic; is that right? A. Yes, sir.

Q. Now, what is No. 1?

A. No. 1 is the tractor or the power unit of the train.

Q. That is the Converse rig? A. Yes, sir.

Q. And No. 2?

A. Would be the first trailer immediately behind the power unit.

Q. And No. 3?

A. Would be the second trailer back from the power unit.

Q. What, if any damage—or before we leave here, let's go on and put the other truck on, if you will? Where you found it?

A. Should I number this also?

Q. Yes, would you number that No. 1 and No. 2? All right. Now, you have drawn two figures, both of them facing in the general direction of Eugene, but anglewise with the rear end of each rig toward the center of the road and the front end toward the right-hand bank for Eugene traffic; is that right?

A. Yes, sir.

(Testimony of Harold L. Taylor.)

Q. And with respect to the position of No. 2 of the last drawing you have made, what was that?

A. This No. 2 is a tanker trailer. [44]

Q. I see, and No. 1? A. Is a tank truck.

Q. I see. What, if you know, is the over-all length, approximately, of that rig?

A. Oh, very nearly 60 feet.

Q. I see. About what was the distance between the two groups of vehicles?

A. From here to here (indicating), you mean?

Q. Yes, from the two groups of vehicles?

A. I couldn't say definitely as to the exact—it was 129 feet and some inches.

Mr. Gearin: Six inches, I believe.

The Witness: I am sorry. I don't have that. Sergeant Hazelwood has that in his notebook.

Q. (By Mr. Vergeer): But do you recall that that is substantially right? A. Yes, sir.

Q. Now, where was the damage to those vehicles?

A. Well, the only perceptible damage to the Pacific Intermountain Express was in this rear portion here (indicating) to the tanker, upper top of the tank.

Q. You are pointing to the left rear of the tractor of the tank truck, that is?

A. Yes, sir.

Q. Yes. [45]

A. And this had two double axles and this axle here (indicating) had been jerked back. The hangers and all the mechanism underneath it had been apparently broken loose because this wheel (indicat-

(Testimony of Harold L. Taylor.)

ing) appeared to have dropped back away from the other due to damage. I didn't observe any other perceptible damage to the vehicle other than this corner (indicating).

Q. All on the left rear corner?

A. Yes, sir.

Q. Was there any damage to the trailer?

A. None that I recall, sir.

Q. How about the Converse rig; where was the damage on that?

A. As I recall, the majority of the damage was suffered by the tractor. It would be the left front and side of the tractor that received quite an extensive damage.

Q. Extensive damage?

A. Yes, sir, the cab was loose, as I recall, and this whole area (indicating) was dented in quite a bit here (indicating).

Q. How about the trailers; were either of those damaged that you recall? A. I don't recall.

Q. Do you want to resume the stand now? Could you determine an area of impact?

A. No, sir. [46]

Q. Would you let me put it this way: Did you find debris on the road apparently from the collision? A. Yes.

Mr. Gearin: Just a moment, your Honor, I'd object to the form of the question.

Mr. Vergeer: Very well, we'll restate it.

Mr. Gearin: I ask that the answer be stricken and the jury instructed to disregard it.

(Testimony of Harold L. Taylor.)

The Court: The jury is instructed to disregard both the question and the answer.

Q. (By Mr. Vergeer): Very well, your Honor. Now, did you find any debris on the road?

A. Yes, sir.

Q. And what was the nature of that debris?

A. It was parts of the two vehicles involved in the accident.

Q. Any particular parts that you could identify?

A. Yes, sir, there was parts of a battery. There was parts of the glass from the headlight, and there was other pieces of metal which was on the highway, parts of the vehicle that had fallen off.

Q. About where were these parts of the vehicle with relation to the stopped, damaged vehicles?

A. It was between the two vehicles.

Q. I see. Between the two sets of vehicles? [47]

A. Yes, sir.

Q. Can you tell us whether it was any closer to one set than the other? A. No, I couldn't.

Q. Now, did Mr. Clancy—did you speak to a Mr. Clancy there? A. No, sir.

Q. Did you check to see whether the battery box on the Converse rig was intact? A. Yes, sir.

Q. And was it?

A. No, sir. It was ripped loose. The battery had been broken up.

Q. Did you, at that time, find the Converse driver anywhere? A. Yes.

Q. And where was he?

A. He was seated in another Pacific Intermoun-

(Testimony of Harold L. Taylor.)

tain Express truck which had pulled up just west of the scene of the accident. He was in the cab of that vehicle.

Q. Did you render any first aid to Mr. Noteboom? A. Yes, sir, I did.

Q. And what did you do for him?

A. I put a compress on his knee, a compress on his hand and I further checked him for signs of bleeding or serious cuts that needed immediate attention. [48]

Q. Now, did you check to see whether there were any tire marks leading to either of the stopped, damaged vehicles?

A. Yes. We observed tire marks leading to—from the west to the east to the trailer of the Converse set of doubles. There were tire marks which was—it was hard to determine if it was from the Pacific Intermountain Express, due to the fact that it apparently, when one of them had gone in and——

Mr. Gearin: Well, just a moment, your Honor, we'd object to what apparently was.

Q. (By Mr. Vergeer): Well, you couldn't identify them?

A. No, sir, there was none that we could identify positively from the Pacific Intermountain Express.

Q. All right. Now, will you describe to the jury the tire marks that led to the Converse trailer?

A. Yes. From the front of the Pacific Intermountain Express truck in which Mr. Noteboom was in——

(Testimony of Harold L. Taylor.)

Q. And that was parked some distance toward Eugene from the wrecked tanker; is that right?

A. Yes, it was west of the Pacific Intermountain Express truck. Well, the exact distance I don't know.

Q. Yes, all right, and you traced those tire marks, did you?

A. Yes, they were to the extreme right of the highway, very close to the berm or the built-up shoulder of the road by the snow and extended from the front of this truck to the [49] rear of the second trailer of the Converse.

Q. I see. Were they in a straight line, substantially?

A. No, sir, they were straight for a distance and then, as I recall, they angled to the left to where the truck set out into the highway.

Q. Now, will you step down and draw those marks on the board?

A. As I recall, this other truck was somewhere in this area (indicating). I don't know the exact spot of it.

Q. Very well.

A. The tracks extended from here (indicating) to here (indicating) and then slightly beared to the north in such a manner (indicating). There were—these here (indicating) were very faint and wasn't very perceptible and it became more perceptible in this general area here (indicating) which extended in a manner similar to that (indicating).

Q. Will you also mark on there, generally, the

(Testimony of Harold L. Taylor.)

place where the parts of the trucks were found or the debris?

A. It was in this area (indicating) mainly, and extended on over all of this full area over here (indicating). It was small pieces that extended out from both of the vehicles.

Q. Can you give us the distance of the—approximate, to the best of your recollection—the distance of the tire marks that led to the Converse rig were from its [50] right-hand snowbank?

A. No, sir, I couldn't. We didn't measure those because this truck here (indicating) had obliterated part of them, and it wouldn't have been an accurate measurement.

Q. I see, but beyond that truck and toward Klamath Falls from where that truck was, the right side track was clear; is that right? A. Sir?

Q. From where—we will mark that Truck No. 5 or something. Draw it in there so we will have something to refer to.

The Court: Can you write a "5" in that?

The Witness: Yes, sir.

Q. (By Mr. Vergeer): All right. Now, you have drawn a truck designated No. 5, and that is the truck you found Mr. Noteboom sitting in; is that correct? A. Yes, sir.

Q. And it was from that truck forward that you traced the tire marks to the Converse—the wrecked Converse rig? A. Yes, sir.

Q. And from there forward, how far were the

(Testimony of Harold L. Taylor.)

right-hand tire marks from the right-hand snow-bank?

A. These tire marks were from, extremely close, practically up against them. They extended right out to the extreme edge of this berm (indicating) of snow which is on this area (indicating). [51]

Q. I see. Okeh, I think you can resume the stand. Do you want to put the chalk down, first? You may inquire.

Cross-Examination

By Mr. Gearin:

Q. Officer, did you make notes of your investigation? A. No, sir.

Q. All right. You remember, you have investigated Officer Hazelwood's notes to refresh your memory? A. Yes, sir.

Q. And I will ask you what significance is there that Officer Hazelwood's report didn't contain any mention of the marks to which you have just testified?

A. Because there was no measurements taken of it, sir.

Q. All right. As far as the measurements were concerned, Officer Hazelwood made the measurements?

A. He read the measurements. I held the lead end of the tape for him, yes, sir.
chains on the tractor, did it?

Q. All right. Now, the Converse rig had no

(Testimony of Harold L. Taylor.)

A. No, neither one of them had chains.

Q. The marks that you have indicated on the diagram here, Officer Taylor, led up to the rear unit of the three vehicle train of the Converse?

A. Yes, sir.

Q. Now, I was wondering if the clerk would hand to the [52] witness, please, the remaining photographs which have not been received in evidence bearing, I think, they're numbered 23-A to L. Officer, are those pictures of the scene of the accident as it existed when you got there?

A. Yes, sir, this first one shows it.

Q. Well, I think, officer, if I may interrupt you for a moment, will you look at all of them and then tell us if they are all pictures of the accident, and I may ask you about each one or any one in particular?

The Court: Were they taken immediately after the accident?

Mr. Gearin: Yes, sir.

The Court: About the time that he arrived?

Mr. Gearin: Well, I will ask the officer that. Were you there when the photographer was there?

The Witness: I was there when there were pictures being taken, sir.

Mr. Gearin: All right. Any objection to the introduction of these photographs?

Mr. Vergeer: Not if the officer could identify them. We don't know whether these are the pictures that were taken.

(Testimony of Harold L. Taylor.)

Mr. Gearin: Those are the only pictures of which I have any knowledge about being taken.

The Court: Have you seen those pictures?

Mr. Vergeer: I am not sure that I have, your Honor. [53] Counsel tells me that he has seen them, but I think that the officer should be permitted to identify them. He should have no trouble.

Q. (By Mr. Gearin): And there are two pictures, are there not, officer, of the daylight scene of the accident without the snow?

A. I didn't see them, sir—oh, yes, the scene; yes, there is two daylight pictures. However, I believe that of the Converse set here (indicating). These pictures were taken after the trailers had been moved, sir.

Q. I see. Well, those are the trailers that were involved? A. Yes, sir.

Mr. Gearin: May I approach the blackboard, your Honor?

The Court: Yes, go ahead.

Q. (By Mr. Gearin): Officer, there were lots of track marks around the scene when you arrived at what, two-twenty in the morning?

A. Two-twenty, yes, sir.

Q. Did you ascertain whether or not the tire marks that led up to the right rear of the third vehicle in the three train vehicle of Converse extended under the third unit? A. No, I didn't.

Q. Well, you mean they didn't or that you didn't see it?

A. I—we observed it. We checked it, sir, and it

(Testimony of Harold L. Taylor.)

did not extend beyond the rear wheel of the third unit. [54]

Mr. Gearin: We will offer the photographs in evidence, your Honor.

Mr. Vergeer: I think, your Honor, that the photographs of the scene are taken, at most, at different times. I don't know what the purpose is.

Mr. Gearin: Only for the purpose of illustration.

The Court: The snow is gone and so are the vehicles.

Mr. Vergeer: I would like to see them again if I may.

The Court: Show them to him. The pictures taken at the scene of the accident are admitted. The other two pictures we will wait for objection, if any.

Mr. Vergeer: Well, I take it that nothing is claimed for them by way of evidence in this case. They are simply illustrative of the scene.

Mr. Gearin: That's the sole purpose of them being offered.

Mr. Vergeer: Well, if that's the sole purpose, I have no objection to them being admitted.

The Court: All right. They are admitted for the limited purpose of just showing the area.

(Whereupon, Exhibits 23-A to 23-L, both inclusive, were admitted into evidence.)

The Court: Go ahead.

Mr. Gearin: I have no further questions, your Honor. [55]

(Testimony of Harold L. Taylor.)

Redirect Examination

By Mr. Vergeer:

Q. Officer, the vehicles as shown in these pictures, were they in the position on the pictures in which you first found them when you arrived?

A. On some of them I can't determine it, but the one that shows the clear view from approximately—it seems to be midway down east. It shows the vehicles. The train of vehicles have been moved and the highway appears to have been cleared when this picture was taken.

Q. Traffic had been re-established on the highway before the picture was taken; is that right?

A. I couldn't say that the traffic had been re-established, but I could say that this wasn't an accurate picture of the position these vehicles come to rest in, sir.

Q. What number picture, particularly, do you notice that in?

A. In No. 23-J, No. 23-D, No. 23-F and that's it. Well, this one (indicating)——

Q. May I ask you this, officer, were the vehicles moved while you were present? A. Yes.

Q. And about how long after you arrived?

A. Well, I couldn't say the exact time. It was quite some time after I arrived at the scene of the accident, but before the highway was cleared. I don't know the exact [56] time that the highway was cleared, sir.

(Testimony of Harold L. Taylor.)

Q. Now, can you tell me whether you had completed making your observations and taking your measurements before anything was moved?

A. Yes, sir, we won't allow it.

Q. And until the vehicles were moved, was it possible for any other vehicle to travel through there?

A. No, sir.

Mr. Vergeer: That's all.

Mr. Gearin: I have nothing further, your Honor.

The Court: That's all. Call your next witness.

Mr. Vergeer: Officer Hazelwood, please. [57]

WILLIAM HAZELWOOD

was thereupon produced as a witness on behalf of the plaintiff, and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Vergeer:

Q. Will you state your name for the jury, please?

A. William Hazelwood

Q. And what is your business, sir?

A. Law enforcement, State of Oregon.

Q. You are a State Police Officer?

A. That's right.

Q. How long have you been with the State Police?

A. Thirteen years—two and a half years.

Q. And during that time have you had occasion to investigate accidents?

A. Yes, sir.

(Testimony of William Hazelwood.)

Q. What was your particular assignment or duty during March of 1956?

A. I was on the highway.

Q. What highway was that?

A. I mean I was patrolling the highway.

Q. Patrolling what area of it?

A. In the Gilcrest area.

Q. Does that include the scene of this accident?

A. Yes. [58]

Q. And where were you stationed?

A. In Gilcrest.

Q. How far is that from the scene of this accident?

A. It seemed to be about twenty-seven miles, approximately.

Q. Can you tell us about how far it is from the scene of this accident to Portland?

A. I don't know.

The Court: Well, how far is it from Eugene?

Q. (By Mr. Vergeer): Yes, how far is it from Eugene?

A. It's a little over seventy miles.

Q. A little over seventy miles. All right. And it's about a hundred and twenty miles to Eugene, is it?

A. That's right.

Q. All right. Now, about what time did you arrive?

A. I believe it was two-twenty a.m.

Q. Did you arrive before or after Officer Taylor arrived?

A. I was there before Officer Taylor.

Q. And when you arrived, from which direction—you came from the Klamath Falls direction,

(Testimony of William Hazelwood.)

didn't you? A. That's correct, yes.

Q. And about how far is it from the junction to the scene of the accident?

A. Crescent Lake Junction?

Q. Crescent Lake Junction.

A. It's approximately 200 yards or just under 2/10th of a mile. [59]

Q. What is the grade of the road at the scene of the accident as to whether it was uphill or downhill, and, if so, in what direction?

A. It's very nearly level. It's a very slight down-grade towards the Klamath area.

Q. At the time you arrived, was there any snow on the ground? A. Yes, sir.

Q. What was the condition of that snow on the roadway?

A. It was packed, grated and hard packed.

Q. And how about the snow alongside of the road; about how high were the snowbanks on either side?

A. There was a 3½-foot snowbank on the south side, or the right side facing Klamath, and 4½ feet on the left.

Q. Facing Klamath, you are talking about?

A. Yes, facing Klamath.

Q. How far was it between the snowbanks?

A. Twenty-three feet, 8 inches.

Q. Now, when you arrived, what was the position of the two sets of vehicles?

A. Very similar to that diagram there (indicating).

(Testimony of William Hazelwood.)

Q. Is that substantially the position they were in? A. Yes.

Q. Was it possible for you to drive your car past the scene of the accident?

A. No, it was impossible to get back. [60]

Q. I take it then that from looking at the diagram that the Converse train completely blocked the highway? A. That's correct.

Q. Now, did you notice the position of the Pacific Intermountain truck? A. Yes.

Q. And what was its position with relation to the road?

A. Well, the front end was in the snowbank and the rear end was out on the road similar to that. The trailer tank was jackknifed and the front truck under the trailer was completely—in other words, the front angle was perpendicular with the rest of the trailer.

Q. Could you possibly take this model which is not a tanker truck but is a truck apparently loaded with wood and set it in the position that you found the truck in question? A. Yes.

Q. Let's just, for the purpose of this illustration, assume that this is the size of the road (indicating) and that would be—if this were the side of the——

A. The front end was in the snowbank.

Q. Now, where, if anywhere, was there damage to this tanker truck and trailer?

A. The rear end of the side of the oval-shaped tank was damaged and there was one more axle similar to this right here (indicating), and it was

(Testimony of William Hazelwood.)

pulled back slightly and the [61] undercarriage was damaged very badly.

Q. Was there any damage whatsoever to the trailer? A. No.

Q. Do you want to resume the stand?

(Whereupon, the witness resumed the stand.)

Q. (By Mr. Vergeer): Did you check the Converse train to see where the damage was on that?

A. I did and the tractor and just generally the trailers, but I didn't make notes on the damage to the trailers at all. I did on the tractor.

Q. All right. Where was the damage to the tractor? A. The left front end.

Q. And any damage to the left side of the tractor? A. Yes.

Q. How about the battery box and the equipment, electrical equipment along the left side of the tractor; was that intact or otherwise?

A. No, that was just practically exploded similar to an explosion all over the highway, particles of battery and pieces of metal and what not.

Q. And where was that debris located?

A. May I show you?

Q. Yes, you may step down.

A. In this general area in here (indicating), more of a throwing motion toward the Converse rig, right in this [62] general area (indicating).

Q. Generally in the middle of the road and all over that area? A. Yes.

(Testimony of William Hazelwood.)

Q. Were you able to find any tracks, any wheel tracks leading up to the Converse vehicle?

A. Yes, along the edge of the snowbank on this, on the right-hand side of the road (indicating).

Q. That is on the right side facing Klamath Falls?
A. Yes.

Q. And were those tracks clear?
A. Yes.

Q. And where did they lead?

A. They led up to the rear of the Converse.

Q. How far from the right snowbank were those tracks?

A. Well, it actually bit into the snowbank. As the snow went up to the bank, it bit into the edge of the snowbank and that's the way you could tell they were there. Otherwise, on the hardtack they wouldn't be there.

Q. I see, and you could trace those right to that trailer?
A. Yes.

Q. Now, from how far back did you trail those?

A. Back to this truck that was parked that the driver of the Converse truck was sitting in.

Q. That's to No. 5? [63]
A. No. 5.

Q. About how far would you estimate that was?

A. From 5 to 3?

Q. Yes.

A. I would say approximately 200 feet.

Q. All right. Do you want to resume the stand?
(Witness resumes stand.)

Q. (By Mr. Vergeer): Were there any marks that you could trace to the Pacific Intermountain truck?
A. Tire tracks?

(Testimony of William Hazelwood.)

Q. Yes. A. Yes.

Q. There were tracks? A. Yes.

Q. And I am sorry I didn't ask you awhile ago, then, where were they?

A. They were behind the tank trailer.

Q. And how far could you trace those?

A. Well, just right behind the trailer.

Q. Just right——

A. They didn't go any distance. They were right behind the trailer.

Q. Could you give any estimate of their lengths?

A. No, sir, I don't think so. They were obliterated out, and there was no effort made to measure them. [64]

Q. Where were they with relation to the right-hand bank traveling toward Eugene?

A. They were close, fairly close.

Q. Were you able to see any marks and connect them with the rear wheel of the tanker?

A. No, sir.

Q. Did you talk to Mr. Clancy? A. Yes.

Q. He was the driver, as I take it, of the Pacific Intermountain truck? A. That's correct.

Q. And did he tell you or point out to you any area of the impact?

Mr. Gearin: I object on the ground that Mr. Clancy is not a party, and it is part of the *res gestae*, and this man cannot make a definite statement on his part.

The Court: Objection sustained.

Mr. Vergeer: Your Honor, I would say that this

(Testimony of William Hazelwood.)

man was in the course of his employment in operating his truck and discussed what he had done with it.

The Court: Objection sustained.

Mr. Vergeer: Very well. Did you see a Mr. Burton at the scene of the accident?

The Witness: Yes.

Mr. Vergeer: I think that's all. [65]

Cross-Examination

By Mr. Gearin:

Q. Officer, you have referred to your notes in order to refresh your memory for the trial here?

A. Yes, sir.

Q. All right. I am going to ask you, officer, may I approach the blackboard, sir?

The Court: Yes.

Q. (By Mr. Gearin): If it is not a fact from the left front of the P.I.E. truck, it was 17 feet to the other side of the highway?

A. I'd have to look at my notes.

Q. If you will do that, please?

A. That's correct.

Q. All right. And at the rear left of our truck it was 11 feet, 7 inches to the other side of the highway?

A. That's correct.

Q. And at the front of the trailer was 22 feet, 7 inches to the other side of the highway?

A. It was measured, sir, from the left front wheel of that trailer which was under the truck.

Q. Right, and then from the left rear dual of the tanker trailer would be 14 feet, 9 inches to the side?

(Testimony of William Hazelwood.)

A. That's correct.

Q. And the distance from the rear of the trailer, the [66] tanker trailer to the third unit of the Converse rig was 129 feet, 6 inches? A. Correct.

Q. All right. Now, at that time, you obtained and signed your name to Mr. Clancy's tachograph card?

A. That's correct.

Mr. Gearin: I wonder if I might have that, and it be submitted to the witness, your Honor? There are two of them. I'd have to pick them out.

The Court: Do you want to make the officer your witness?

Mr. Gearin: Pardon me?

The Court: You are making the officer your witness?

Mr. Gearin: For this purpose.

The Court: All right. You ask him any question so that you don't have to put on any officer here, put on your full case, any question you want to ask him.

Mr. Gearin: Thank you. Is that the tachograph card, officer? A. Yes, that's it.

Q. All right. And that is Exhibit No. what?

A. Twenty-six-A.

Q. Now, officer, may I see your notes, please?

A. Yes.

Q. Officer, you did not establish the point of impact, did you? [67] A. No, sir.

Q. I note, officer, this following language, "Converse apparently got over for a meeting, something came back abruptly," and that's been crossed out?

(Testimony of William Hazelwood.)

A. Yes, sir.

Q. This says it was rather cold that night when you were out there; is that true?

A. That's true.

Q. What was the condition of the surface of the highway as far as being slippery?

A. It was very slick.

Q. Did that keep you busy most of the morning? I note from your notes, officer?

A. That's right.

Q. I didn't see any mention in your note with regard to the marks that led up to the rear of the Converse trailer, No. 3?

A. That's right.

Mr. Gearin: I have no further questions, thank you, officer.

Redirect Examination

By Mr. Vergeer:

Q. Officer, as long as—did you take measurements to the wheels of the Intermountain rig, that is, the Pacific Intermountain express? [68]

A. Yes.

Q. I'd like to put them on the board then. Can you see the board here; see what I am doing?

A. Yes, sir.

Q. All right. Can you give me the measurement from the rear of the Intermountain truck to the bank?

A. Eleven foot, 7.

Q. Eleven feet, 7 inches; is that correct?

A. That's correct.

(Testimony of William Hazelwood.)

Q. All right. Now, from the front?

A. Seventeen feet.

Q. And no inches? A. That's right.

Q. All right. Now, as I understand it, the wheels of the tractor from your illustration you measured the wheel of the trailer, the forward axle under his trailer? A. That's right.

Q. And did you then take it from the most forward wheel? A. No, the next one.

Q. The back one? A. Yes.

Q. From there to the other bank?

A. 22-7.

Q. 22-7 and then from the rear of that trailer did you take that from the wheels, too? [69]

A. Yes, 14-9.

Q. 14-9. Counsel asked you if you established a point of impact, and I believe you said "No." Did you have any evidence at all of the point of impact?

Mr. Gearin: Well, we'd object to that, your Honor. The officer said it was not established.

The Court: Well, he might be able to establish it. Go ahead and answer the question.

The Witness: It was impossible to establish the apparent point of impact other than in a large general area.

Q. (By Mr. Vergeer): All right. Was that general area, or where was that general area without trying to pinpoint it?

A. Between the two trucks.

Q. Well, was it closer to one or the other or in the middle?

(Testimony of William Hazelwood.)

A. I believe it was a little closer to the Converse where they ended up, the way they ended up.

Q. I see; a little closer to the Converse and in between the two?

A. The debris was a little closer to the Converse.

Mr. Vergeer: That's all. Thank you very much.

Recross-Examination

By Mr. Gearin:

Q. One thing more, officer, referring to your notes. This end (indicating), the right rear of the Converse Unit No. 3 was, as I understand it, 11 feet, 8 inches from the side of [70] the highway?

A. That's correct.

Mr. Gearin: Thank you, sir.

Redirect Examination

By Mr. Vergeer:

Q. Now, in going back from the rear of that truck, you say you traced a mark, a tire mark that you have described as having been right along the snowbank. Where did it leave the snowbank?

A. Where did it pull away from the snowbank?

Q. Yes, to go to the trailer?

A. Well, I couldn't say, other than in the general area of where the fresh snow was thrown out across the highway, in that general area. It left the snowbank and went towards it.

Q. How far back of the trailer was that about—your best recollection?

(Testimony of William Hazelwood.)

A. Oh, it wasn't very far. I would judge 30-40 feet.

Q. Thirty to 40 feet? A. About that.

Mr. Vergeer: All right, thank you.

The Court: Any further questions?

Mr. Gearin: Not from me, sir.

The Court: That's all. The officer is excused from further attendance to the trial. [71]

Mr. Vergeer: I would like to have the officer remain for at least a very short time, your Honor.

The Court: All right, next witness.

Mr. Vergeer: We will call Dr. Davis. [72]

DR. EDWARD W. DAVIS

was thereupon produced as a witness on behalf of the plaintiff, and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Vergeer:

Q. Will you tell the jury your name, doctor?

A. Edward W. Davis.

Q. And what is your business or profession?

Mr. Gearin: We will admit the doctor's qualifications, your Honor. I admit that he is specializing in the field of neurology or neurosurgery.

Q. (By Mr. Vergeer): Will you state your qualifications generally for the jury?

A. Yes, sir.

(Testimony of Dr. Edward W. Davis.)

The Court: Well, not in this court you won't. Once the qualifications are admitted, you don't. Ladies and gentlemen of the jury, it is admitted that Dr. Davis is a duly qualified and practicing physician and duly licensed here, and that he is specializing in the field of neurosurgery, and that he confines all of his activities to that. Now, doctor, will you tell us what the field of your surgery is?

The Witness: Primarily the surgical treatment of the brain, spinal cord, peripheral nerves, whether it be from injury or any disease that might be amenable to surgical treatment. [73]

Q. (By Mr. Vergeer): And in order to practice that specialty, doctor, do you have to diagnose those conditions? A. Yes, sir.

Q. Did you see Mr. Noteboom?

A. I did, yes.

Q. And when was that, sir?

A. May I refer to my notes?

Mr. Gearin: We object to that, your Honor, the doctor's report has not been given to me and it's not been marked as a pretrial exhibit. I anticipated that Mr. Crookham would supply me with it. I gave him a copy of my medical report.

Mr. Crookham: Your Honor, I am very sorry it was not sent to Mr. Gearin the other day. It was an oversight on my part that I did not have it marked yet.

The Court: All right, have it marked first. Doctor, did you write a letter to Mr. Crookham or Mr. Vergeer?

(Testimony of Dr. Edward W. Davis.)

The Witness: I did, yes, sir.

The Court: Do you have a copy of that letter?

The Witness: I have just the one copy, your Honor.

Mr. Vergeer: We have a copy that is the original, I believe.

The Court: Look at the original, do you have your office notes also?

The Witness: Yes, sir.

The Court: And was this letter taken from the office [74] notes?

The Witness: Yes, sir, I made notes and then actually I dictated it a short while after I made the examination.

The Court: All right, we will mark the original letter to Mr. Vergeer as an exhibit for identification and you can refer to that; if you want to question, you may refer to that one.

Mr. Vergeer: Very well, your Honor, thank you.

The Court: Give it to him.

Mr. Vergeer: That would be our Exhibit No. 20, I believe.

(Whereupon, letter referred to was marked Exhibit No. 20 for identification.)

The Court: It's only for identification.

Q. (By Mr. Vergeer): Yes. When did you examine Mr. Noteboom, doctor?

A. On January 10, 1957.

Q. And where was that examination made?

A. In my office in Portland.

(Testimony of Dr. Edward W. Davis.)

Q. And did you—what did you find upon making your examination, doctor?

A. Do you wish me to go into the history and all that I did at that time?

Q. Well, yes, whatever goes into your diagnosis.

Mr. Gearin: We'd object to that, if your Honor please, the plaintiff only went to this doctor and had this examination [75] only for the purpose of being called upon to testify.

The Court: The history of what; are you talking about the history of the accident?

Mr. Gearin: His history of his physical condition.

The Court: I am going to overrule you on that. The doctor, in order to make a diagnosis has to rely—did you have to rely on what he told you in order to make a diagnosis?

The Witness: Yes, sir, your Honor.

The Court: All right, you go ahead.

Q. (By Mr. Vergeer): Very well, doctor.

The Court: You have the privilege of cross-examination, but I am going to overrule you on the theory that a doctor who makes an examination for the purpose of making a report is limited to physical findings. All right, go ahead.

The Witness: Mr. Noteboom told me he had been injured on March 7th, 1956. At this time he he had been driving a loaded truck and an oncoming tanker truck——

The Court: Well, now, don't tell about that.

(Testimony of Dr. Edward W. Davis.)

who was on the right side of the road because that's for the jury to determine.

The Witness: He stated he was pinned in the cab of his truck and suffered the major injury to the leftside of his body where the impact occurred. He was unconscious for perhaps one to one and a half minutes. When he came to, he [76] saw steam rising and immediately thought that his truck might be on fire and made extreme efforts to extricate himself from the cab. He was finally able to free himself but does not remember too much of what happened following that. He was hospitalized overnight in Eugene where multiple lacerations were sutured, and because of extensive lacerations over the left knee his left leg was in a cast for the following three weeks.

Following the accident, he had a very severe headache which was primarily over the frontal area. At first this headache was continuous but within a few days it became intermittent. He still has the same type of headache which occurs over the frontal area. Usually he wakes in the morning without headache but as the day progresses he develops more and more headache. He has had his eyes checked and has been given a prescription for glasses which has had no effect on the headache. He states that he has had two episodes of transitory dizziness since the accident but other than this has had no persistent dizziness. The man returned to work approximately one month after the accident and has been working since that time.

(Testimony of Dr. Edward W. Davis.)

In the accident he suffered a good deal of bruising over the left side of the hand, along with a laceration over the dorsum of the hand. He states that this still bothers him somewhat and there is a numb sensation [77] over the knuckle. He also suffered some crushing injury to the left foot but this does not bother him at the present time. In cold weather the left knee still gives some pain but other than this seems to be getting along satisfactorily. He also complains a little of the left elbow at times when he states that he can feel a loose bone over the point of the elbow.

In going through his past history, there was nothing of significance. His only operative procedure has been an appendectomy, and he has had no previous serious accidents.

On examination this is a very large man who is 6 feet, 5 inches tall and weighs 260 pounds. His blood pressure was normal. There was a scar over the back of the left-hand in the region of the fourth and fifth metacarpophalangeal joint, which is in this area (indicating). This portion of the hand is still slightly swollen as compared to the right. There is an area of sensory disturbance around the laceration. That is, right at the area of the scar there is a small area where the sensations are not normal as it is in the other parts of the hand. There are multiple scars over the left knee, but there is no restriction of motion in the knee joint.

Movements of the cervical spine are intact, but there is considerable tenderness to pressure over

(Testimony of Dr. Edward W. Davis.)

the [78] occipital muscular attachments, which is where the neck muscles come up and attach into the back of the head in this area (indicating). There is also residual acute tenderness in the scalp in the mid-occipital region. In the back here (indicating), and it is at the point where he stated he had had a large swelling after the accident. A bump had come up there. The neurological examination was essentially negative. The cranial nerves were tested from one through twelve, and those were all normal.

Sensation over the extremities and the trunk was normal except for this small area over his hand near the scar. Motor power in all muscle groups was good and there was no atrophy or wasting of the musculature. His co-ordination was normal. His reflexes were all equal except for the right Achilles reflex, which is a reflex at the ankle, and this seemed to be diminished. I was unable to correlate this with anything that occurred in the accident.

In other words, there is no other finding to go along with this that had suggested that he had sustained any injury at the time of the accident which accounted for this.

I had X-rays taken of the skull, left knee, left elbow, left hand and these showed no evidence of fracture or abnormality. It was my impression after this examination that this man had sustained a mild brain concussion as well [79] as multiple contusions and lacerations over his arm and leg which have been mentioned. His major complaint

(Testimony of Dr. Edward W. Davis.)

seemed to be that of headaches which I thought was a residual post-traumatic type of headache, and by that, I mean a headache which sometimes we see after a bump on the head such as he had and a mild concussion. I did not feel that there was any serious or permanent damage to the brain or central nervous system. It was my feeling that these headaches would gradually subside with the passage of time.

Mr. Vergeer: You may inquire. Just a minute, doctor—well, no that's all. You may inquire.

Cross-Examination

By Mr. Gearin:

Q. Dr. Davis, these headaches that the man told you about, you couldn't find anything objective as to why those come up, could you?

A. Only that he had some tenderness here (indicating). At the time, I did not think that that tenderness was particularly related with the headache.

Q. All right. Now, doctor, in making your diagnosis of a brain concussion, you say it was mild? You based that in part upon the history that he gave you that he was unconscious?

A. Yes, sir.

Q. All right. Now, assuming, doctor, that he was not [80] unconscious, would that have a bearing on your diagnosis?

A. I doubt in this case. I think certainly he was confused after that. He had sustained a head in-

(Testimony of Dr. Edward W. Davis.)

jury. Certainly from the history I obtained he did get a pretty good bump on the head and was certainly confused, and I think that would be enough to account for his symptomatology.

Q. Well, doctor, in such an injury that he described to you, you would naturally assume that he would have headache after the accident. I think he told you that he had severe headaches following the accident? A. Yes, sir.

Q. I want you to assume, doctor, this statement. Assume that he did not have headache of any kind for a period of at least nineteen days after the accident. Would that have a bearing upon your present prognosis?

A. It would have a bearing on my interpretation of what those headaches were due to.

Q. All right. Now, assume, doctor, that he was not unconscious and assume that he had no headache for a period of nineteen days following the accident. Would you then have an opinion that he had a concussion?

A. If he had no mental concussion and no—was not unconscious at all, I would think he did not have a concussion from your definition of the word.

Q. In the case of a blow to the back of the head of what [81] significance would it be that the patient did not have, say, headaches immediately following the accident?

A. I would then feel that probably these are not post-traumatic headaches. Usually those come on immediately and begin to taper off.

(Testimony of Dr. Edward W. Davis.)

Q. Doctor, you found no restriction of motion in the knee joint? A. No.

Q. And the neurological examination was negative? A. Yes, it was.

Q. And your examination was primarily a neurological examination?

A. That is correct, sir.

Q. The cranial nerves were intact?

A. Yes.

Q. And this motor power was equal and good in all the muscle groups? A. Yes.

Q. That's indicative of what, doctor?

A. That he was in good condition.

Q. In fact, I think that you found that he was in excellent physical condition, didn't you?

A. Yes, sir.

Mr. Gearin: Thank you, doctor, I have no further questions. [82]

Mr. Vergeer: That's all. Thank you very much, doctor.

The Court: That is all. You are excused from further attendance at this trial.

The Witness: Thank you, sir.

(Witness excused.)

Mr. Vergeer: We will call Mr. Burton. [83]

ROY BURTON

was thereupon produced as a witness on behalf of the plaintiff, and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Vergeer:

Q. Mr. Burton, will you state your name for the jury?
A. Roy A. Burton.

Q. And where do you live, sir?
A. Salem.

Q. How long have you lived in Salem?

A. About nine years.

Q. And where were you living in March of 1956?

A. Camp Pendleton, California.

Q. That's the Marine Camp down there?

A. Yes, sir.

Q. And about that time were you about to be discharged?

A. No, sir, I was coming home on leave.

Q. Coming home on leave, and was there anyone with you?

A. Yes, sir, I picked up a hitchhiker.

Q. What sort of an automobile were you driving?
A. An English Hillman-Minx.

Q. About how big a car is that?

A. Very small.

Q. A very small size. And you had come from California; is that right? [84]
A. Yes, sir.

Q. Now, what time did you leave Klamath Falls, do you think?
A. I don't recall, sir.

Q. Did you at any time before you saw an accident occur later in the evening, did you at any

(Testimony of Roy Burton.)

time see a Pacific Intermountain Express tanker and trailer?

A. Yes, I picked them up at the intersection of the main highway.

Q. That's about how far from where the accident happened? A. I have no idea, sir.

Q. Well, three or four miles anyway?

A. Well, I don't know, sir. It was dark, and I didn't know the road.

Q. I see. All right, and did you then follow this vehicle? A. Yes, sir.

Q. About how far behind, would you say?

A. Far enough to be able to see his lights clearly. I don't know the exact distance.

Q. Did he kick up any snow as he traveled along? A. Yes, he did, not a lot.

Q. And you stayed out of that?

A. Yes, sir.

Q. About how fast was he driving?

A. Between thirty and forty, sir.

Q. Now, did you at any time before the accident see the [85] headlights of the Converse Trucking Company which was later involved with this truck?

A. Yes, sir.

Q. Now, will you tell the jury what you saw?

A. Well, I saw the other truck approaching. It seemed to be up above me and coming toward me on a downgrade.

Q. Yes.

A. And I seemed to be going downgrade myself.

Q. You were going downgrade yourself?

(Testimony of Roy Burton.)

A. Yes, sir.

Q. About how far were you apart at that time?

A. Between which truck, sir?

Q. Well, when you first saw the Converse truck coming?

A. I couldn't state the distance. It was snowing—not snowing but white, and I had bright lights.

Q. It was quite some distance?

A. Yes, sir.

Q. You saw it for some time then?

A. Yes, sir.

Q. All right. Now, as the two trucks approached each other, will you tell the jury where each was driving with respect to its right-hand side of the road?

A. They were both on their own side.

Q. And then what happened?

A. I seemed to see the truck ahead of me sway just slightly [86] and then everything went black and I thought we were in a tunnel.

Q. You saw the truck in front of you sway a bit?

A. Just a little bit.

Q. And then the lights went out; is that it?

A. Yes, sir.

Q. Now, was that about when the lights had reached each other?

A. It was just as—I thought they went into a tunnel and disappeared.

Q. What did you do?

A. Turned on my high beams.

Q. And then what did you see?

(Testimony of Roy Burton.)

A. The Converse truck in front of me.

Q. And how far away was it then?

A. I don't know, very close.

Q. What did you do?

A. Shifted down and went off the road.

Q. You drove off the road? A. Yes, sir.

Q. In the snowbank? A. Yes, sir.

Q. Now, the last you saw of these trucks as they were approaching with their lights on and traveling along, and before the truck started to sway, the one truck, were both [87] trucks on their own side of the road?

A. I would say they appeared to be.

Q. To your best recollection and your best judgment they were; is that right? A. Yes, sir.

Q. What did you do; did you get out of your car?

A. Yes, sir, we jumped out and ran to the truck and went looking for the driver.

Q. Which truck?

A. Of the Converse truck.

Q. Did you look for him?

A. Yes, sir, we could hear him but couldn't find him.

Q. I beg your pardon?

A. We could hear him but not find him.

Q. What did you hear? A. Moaning.

Q. And did you finally find him?

A. Yes, we found him up in the cab.

Q. What side of the cab did you reach?

A. It seems like it was the right-hand side, sir.

(Testimony of Roy Burton.)

Q. And that was over by the snowbank at that time?
A. Yes, sir.

Q. What did you do about him?

A. Well, we tried to pull him out, and he came out and fell into our arms. [88]

Q. I see. What did you do with him?

A. I didn't take him from there. The other driver, I believe it was, and my passenger took him.

Q. Was the man, at that time, did he seem to know where he was going?

A. I didn't even stop. I just turned around and ran.

Q. Why did you do that?

A. I wanted to get my car turned around to stop any traffic?

Q. And did you do that?
A. Yes, sir.

Q. How long did you hear this man moaning before you located him finally?

A. Not a great amount of time, sir. I don't know as far as time goes.

Q. But you had gotten—stopped your car and gotten out of it and walked over to the truck?

A. Yes, sir.

Q. You don't know any of the parties in this lawsuit, do you?
A. No, sir.

Mr. Vergeer: That's all. You may inquire.

(Testimony of Roy Burton.)

Cross-Examination

By Mr. Gearin:

Q. Mr. Burton, immediately after the accident, did you hear any explanation made by the driver of the P.I.E. tank [89] truck and trailer?

A. Yes, sir.

Q. All right. Will you tell what you heard him say?

Mr. Vergeer: Well, no, your Honor, I would object to it. Awhile ago I asked that the officer be permitted to say what the P.I.E. driver said, and I was stopped from doing that and I would object now.

The Court: Just because in this case your man is also plaintiff in the case?

Mr. Vergeer: No, he is asking what the P.I.E. driver said.

Mr. Gearin: It is part of the *res gestae*, your Honor. The question was directed to a time immediately after the accident, and it was confined to an exclamation.

The Court: Do you want the other in, too? All right, call the officer back.

Mr. Gearin: Well, I don't—If it's part of the *res gestae* it's not in——

The Court: How long afterward did you get up there?

The Witness: I got there immediately.

The Court: Well, how long is immediately?

(Testimony of Roy Burton.)

The Witness: Well, the trucks were still moving a little bit, the big truck.

The Court: Two minutes, one minute?

The Witness: No, sir, I was right on top of them after they hit. [90]

Mr. Vergeer: Well, your Honor, I would like to object to this because apparently the first he did was to run over to the one driver and when he found him he fell out of the cab in his arms and then he went over to move his car and apparently it was after that time.

The Witness: No, that was after. When we were running to the wreck, the other driver was out there hunting, too.

The Court: I am not going to permit it unless you agree to permit the other one to come in.

Mr. Gearin: Well, my point was that fourteen minutes—it was fourteen minutes afterwards, your Honor. I have no further questions.

Mr. Vergee: That's all I have.

The Court: The witness is excused.

(Witness excused.)

Mr. Gearin: Mr. Burton, will you remain in the courtroom until the recess, please?

Mr. Vergeer: We will call Mr. Sadoff. Before we do that, I believe we have a stipulation as to the damage to the tractor; is that correct, the trailer, pardon me?

Mr. Gearin: Yes, the amount in controversy is

Converse Trucking, \$650. P.I.E. is \$2,026.68, which we stipulate is the amount of their damage.

Mr. Vergeer: It has been so stipulated, your Honor.

The Court: So now call your next witness. [91]

Mr. Vergeer: That takes care of the Converse Trucking Service claim as to the amount of the——

Mr. Gearin: Yes.

Mr. Vergeer: We will now call Mr. Sadoff.

The Court: Tell me that amount again, will you?

Mr. Gearin: \$2,026.68.

The Court: Ladies and gentlemen, it's stipulated that if Converse is entitled to collect, it is entitled to collect for the damage done to the trailers, \$2,026.68 without any further proof. I want to point out to you that Mr. Gearin is not admitting that his clients are liable to that amount. He just admits that if you find that Converse is entitled to collect under the rules of law that I will give you, that is the amount they should collect. [92]

HYMAN A. SADOFF

was thereupon produced as a witness on behalf of the plaintiff, and, having been first duly sworn, was examined and testified as follows:

Mr. Vergeer: Well, I think, your Honor, if I may, I will recall this witness. He has been around, and we can bring in his testimony later. I think that so the order of testimony is right I should put on Dr. Teller's deposition regarding the condition of Mr. Noteboom.

The Court: All right.

Mr. Vergeer: I think it would make more sense that way.

The Court: Mr. Sadoff, would you please sit down?

Mr. Vergeer: How would the Court prefer to do this?

The Court: Mr. Burns, will you take the stand? Give him—what is the name of it?

Mr. Gearin: Teller.

Mr. Crookham: George Teller and the Court Reporter was Robert Frolik, your Honor.

The Court: Where is the deposition?

Mr. Crookham: Well, I understood that the deposition was being mailed directly to the court. Both Mr. Gearin and I have received our copies.

Mr. Gearin: He may have mine, your Honor.

The Court: Ladies and gentlemen, Dr. Teller lives in Eugene, Oregon, and it was agreed that in lieu of him coming here to testify in person, the plaintiffs could [93] take his deposition. Now, the testimony of a witness can be received in various ways. One, if he comes in and testifies here in person; another manner is to take the testimony of a witness under courtroom conditions. Now, Dr. Teller, before he testified, was sworn just as the witnesses here are sworn. That is, he agreed to tell the truth. He was interrogated by Mr. Crookham, and he was cross-examined by an attorney on behalf of the defendant, Pacific Intermountain Express Company. And in this case the questions which were asked by Mr. Crookham will be asked in this hear-

ing by his associate, Mr. Vergeer, and the questions propounded to him on cross-examination will be propounded by Mr. Gearin. Now, the witness, Mr. Keith Burns, will act as Dr. Teller, and he will read the answers given by Dr. Teller at the hearing. The testimony of a witness who appears by deposition is to be judged in accordance with the same rules that I will lay down for you, for witnesses who appear here in person.

Mr. Gearin: Your Honor, we waive the doctor's qualifications, and we will start at the bottom of page 3.

The Court: All right.

DEPOSITION OF DR. GEORGE TELLER

Mr. Verger: Beginning about one line up from the bottom of page 3, you will find the question, "Doctor, in the course of your capacity as a physician, were you consulted for treatment by Donald H. Noteboom? [94] A. I was.

"Q. And can you tell me when you first saw Mr. Noteboom?

"A. I first saw Mr. Noteboom about five o'clock in the morning on March the 7th, 1956.

"Q. And where did you see him?

"A. In the emergency room of this hospital.

"Q. And what was his condition at that time, doctor?

"A. The patient was in no acute distress but had sustained multiple injuries, as quoted to me, in an accident several hours prior to admission.

(Deposition of Dr. George Teller.)

“Q. And would you tell me what treatment, if any, you gave Mr. Noteboom on this, that occasion, and your findings?

“A. Excuse me, just a minute. Do you want this? Do you want this in detail now or do you want just what I did in the emergency room or——

“Q. Would you tell us in the emergency room, and then what you did subsequently?

“A. The patient was examined in the emergency room and the following physical examination was noted. Physical examination—you want blood pressure and all that stuff?

“Q. No. Your positive findings.

“A. The patient was found to have a large egg-size swelling over the back of his head. However, there was no laceration at this spot. The remainder of the physical exam was entirely normal except for the following: The left lower [95] extremity or physical examination of the left lower extremity revealed a deep 3-inch transverse tearing-type laceration, just distal to the patella or kneecap, which penetrated into the kneejoint. There was also swelling about the left ankle and a small tearing-type laceration over the left elbow or the olecranon process. There was a deep laceration about 1 inch in length just proximal to the metacarpophalangeal joint between the ring and the middle finger on the dorsum or back of his hand. The patient was admitted to the hospital for further observation and repair of the lacerations. Later in the morning he was taken to surgery where the wound of the left

(Deposition of Dr. George Teller.)

knee was cleansed, debrided and washed thoroughly and sutured with numerous silk sutures. Pressure dressings were placed on the left-hand wound and the left-elbow wound and the patient returned to the ward. Do you want me to tell when I later saw him?

“Q. Yes.

“A. He was seen by me on two occasions thereafter for further observation and removal of his suture; the last time being seen on March 26th and the patient's condition was considered most satisfactory at that time.

“Q. How long did he stay in the hospital, doctor?

“A. He was released from the hospital approximately at eleven a.m. on the 8th of March.

“Q. That would be the day after? [96]

“A. The day following his accident.

“Q. Did he have any casts on at that time?

“A. At the time of dismissal, he was wearing a posterior leg sprint on the leg of the bad or of the knee laceration.

“Q. Doctor, when you first saw him on the morning on the 7th, do you have an opinion as to whether he had recently sustained a concussion?

“A. At the time I saw the patient he was mentally alert and not suffering from evidence of severe head injury, and he had stated he had not been rendered unconscious at the time of the accident.

“Q. Would the presence of this egg-shaped lump on the back of the head, I think is where you said

(Deposition of Dr. George Teller.)

it was, would that indicate to you that he probably had had a mild concussion?

“A. Yes. In presense of the large lump or hematoma over the back of his head and even in the absence of bony damage to the skull as evidenced by skull X-rays, it is presumable that the patient could suffer from a mild type concussion.

“Q. Actually, doctor, what is a concussion?

“A. A concussion is a type of severe jar sustained to the head.

“Q. Doctor, Mr. Noteboom has testified in his deposition that he was unable to work for approximately one month. Do you feel that that is consistent with the injuries that [97] you found?

“A. I would say that's very consistent with his injuries.

“Q. Mr. Noteboom has also indicted in his deposition that he is suffering from headaches which are not necessarily present in the morning but develop during the course of the day and that these have continued since the time of the accident. Assuming that Mr. Noteboom has such headaches, doctor, do you have an opinion as to whether they probably result from the condition that you found?

“A. I think it is reasonable to assume that anybody having sustained multiple injuries, including one to the head, could have symptoms manifested by headache for some time after an accident such as this one.

“Q. Do you feel that that's probably the situation here? A. It's quite probable.

(Deposition of Dr. George Teller.)

“Q. I think you told us, doctor, that you saw Mr. Noteboom again on the 17th and again on the 26th of March? A. That is right.

“Q. And what did you do for him on each of those occasions?

“A. On the 17th he was merely examined and found to be progressing satisfactorily and one suture was removed from his knee at that time and the wound redressed. Then on the 26th of March the remaining sutures were removed and the patient dismissed.

“Q. How were the wounds to the hand and the elbow? [98]

“A. They were healing very satisfactorily.

“Q. Now, doctor, assuming a person of characteristics that you found Mr. Noteboom who manifests none of the things that you found on the morning of March 7th but who is a truck driver and is involved in a collision wherein two trucks going in opposite directions collide and the driver is in a badly wrecked cab, and assuming the condition that you found Mr. Noteboom in and the findings you specifically made on the morning of March 7th, do you have an opinion as to whether those injuries probably resulted from such an accident?

“A. Yes, I think within several hours after the accident and having seen the patient and examined him, I think these injuries were definitely sustained at the time of the accident.

“Q. Doctor, assuming Mr. Noteboom has the headaches that are described to you previously con-

(Deposition of Dr. George Teller.)

tinuing to the present time, do you have an opinion as to how long those headaches probably will continue?

“A. Well, that’s hard to say. I think it depends on various individuals. Some patients with the same injury would maybe never have experienced headache following the accident. Whereas, other patients these post-traumatic headaches may continue for several months. [99]

“Q. Well, do you have an opinion knowing these facts as to how long they will continue beyond the present time?”

Mr. Gearin: I will waive the objection that appears in the record, your Honor.

The Court: All right. Go ahead.

Mr. Burns: “Answer: No, because I haven’t seen him. I don’t know.

“Q. Well, what I am saying is assuming that——”

Mr. Vergeer: For the purpose of the record, I think I might say there is indication of discussion between counsel as to this question.

Mr. Burns: “Answer: Well I don’t believe I could say how long.

“Q. Doctor, I will ask you if you waive reading and signing of this deposition?

“A. Yes.

“Q. Doctor, what were the charges made for the hospital and surgical services for Mr. Noteboom?

(Deposition of Dr. George Teller.)

“A. The total fees, hospitalization, surgery room and the doctor’s fee was a total of \$171.60.

“Q. Doctor, in your opinion is that a reasonable charge?

“A. I think it is most reasonable. As I recall, I spent a couple of hours in there with that guy with that knee.”

Cross-Examination

By Mr. Gearin:

“Q. Doctor, in giving your testimony this morning you have [100] referred to your notes and apparently that is your chart that you kept at the time? A. Right.

“Q. Can I see that, doctor?

“A. The hospital chart and the post-hospital followup.

“(Documents handed to counsel for examination.)

“Q. As I understand your testimony, doctor, and it also appears on your notes, that the patient was not rendered unconscious in the accident?

“A. That is correct.

“Q. Now, on your record that you have here, I notice that you have indicated the date last treated was March 26, 1956? A. That is right.

“Q. And that’s the last time you have seen this patient? A. Last time I saw the patient.

“Q. Has he, to the best of your knowledge, been treated any further in this hospital?

“A. Not that I know of.

(Deposition of Dr. George Teller.)

“Q. You have written on here, ‘Question: Further treatment necessary?’ And you have indicated your answer, ‘No.’ Was that your opinion at that time?

“A. That was my opinion when I last saw the patient.

“Q. Yes. Has anything happened since that time to change that opinion, doctor?

“A. No. [101]

“Q. And you have also asked the question on your medical report, ‘Anticipated complete recovery?’ And you have indicated your answer, ‘Yes,’ Is that still your opinion, doctor?

“A. That’s right.

“Q. So far as your opinion at this time is concerned then, based upon your full knowledge of the injuries sustained by this particular patient, it would be your opinion, I take it now, that he should have a complete recovery from these injuries?

“A. That was my opinion when I last saw the patient, yes.

“Q. And has anything happened since then to change that opinion?

“A. I haven’t seen him or heard from the patient.

“Q. Your testimony also was, as I recall, that X-rays of the head were taken and that there was no bony injury? A. That is correct.

“Q. Your testimony also was, as I recall, that there was no laceration of any part of the head?

“A. That is correct.

(Deposition of Dr. George Teller.)

“Q. The only thing then that you found was this lump on the back of the head and this hematoma or bruise, is that right?

“A. The lump which was a hematoma, yes.

“Q. And what is a hematoma, doctor? [102]

“A. A hematoma is a blood clot caused from any injury to the scalp or other tissue which is actually bleeding in the tissue.

“Q. Yes. Was any treatment rendered to his head for that hematoma? A. No.

“Q. Was it the type of a hematoma that you would expect naturally to absorb within the tissues?

“A. That is right.

“Q. So ordinarily one would not give any medical treatment for such a hematoma?

“A. That is right, except observation,

“Q. Yes. Now, on your chart you have indicated that his last examination revealed that his condition on March 26th, 1956, was most satisfactory?

“A. That is correct, I believe.

“Q. Would that include the condition on the back of the head, the hematoma? A. Yes.

“Q. Had that cleared up by that time?

“A. If I recall, it was practically cleared.

“Q. Now, doctor——

“A. Or not practically; it was, definitely.

“Q. It was all cleared up? A. Yes. [103]

“Q. I take it from your testimony and from your record here that there was no complaint made by him at that time of headaches?

(Deposition of Dr. George Teller.)

“A. Not to the best of my knowledge or my record, no.

“Q. So far as you know, he was not complaining of headaches during the period of approximately three weeks in which you treated him?

“A. May I see that? How was that question?

“Mr. Gearin: Would you read it back to him.

“(Whereupon, last question was read back by the reporter.)”

Mr. Burns: And the answer is, “That is correct.

“Q. Your answer, doctor, to that question is that he was not complaining of headaches, is that correct?

“A. That is correct.

“Q. Well, then so far as your own knowledge is concerned, you don’t know that he ever had any headaches from this accident, do you not?

“A. That is right.

“Q. Now, speaking in terms of medical probabilities, doctor, if we assume that the man was not complaining of headaches to you during the period of three weeks immediately following the accident in which period you were treating him for the injuries allegedly sustained in the accident, and assuming that he did not lose consciousness in the accident, and that [104] there was no laceration to any part of the head but only a hematoma on the back of the head, and that there was no bony injury to any part of the head and that the plaintiff is not complaining of any inability to work resulting more than one month beyond the accident, would you ordinarily assume under those circumstances that there would be a

(Deposition of Dr. George Teller.)

probability of headaches resulting from that particular trauma and carrying on until this time?

“A. Here we go with that probability and possibility business. Well, I think it’s very possible that even though the patient did not complain of headache during the time he was observed by me, and I know that in some instances it has happened that patients do develop headaches at a later date following trauma of this type——

“Q. We have to speak of probabilities, doctor; **not possibilities.**

“A. Well, I think it is reasonable. That it is probable that he could, even in the face of not having complaint at the time of observation.

“Q. On a concussion to the head, if it is a severe concussion, is there not usually a temporary loss of consciousness at the time of trauma?

“A. I believe I would say yes.

“Q. Well, then, doctor. isn’t it probable that if there was not a temporary loss of consciousness, that any concussion he might have sustained would be a slight concussion? [105]

“A. Yes, I would say that this type of injury was a slight concussion.

“Q. Ordinarily on a slight concussion to the back of the head without bony damage, without laceration, and which concussion and the hematoma resulting therefrom is completely cleared up within twenty days thereafter, isn’t it probable that there would be no headaches resulting for any considerable period of time from such concussion?

(Deposition of Dr. George Teller.)

“A. Well, I don’t believe I could answer that as a probability. I think that depends on the individual.

“Q. Customarily there would be none from that type of a blow, am I right in that?

“A. Well, customarily, yes. However, that, too, depends on individuals I think.

“Q. Yes. Your testimony earlier was that the patient was mentally alert at the time you first examined him? A. That is correct.

“Q. This was, I believe, according to your recollection, some three hours after the trauma had supposedly been sustained?

“A. Approximately three hours, yes, or three or four hours.

“Q. Three or four hours?

“A. Three or four hours.

“Q. Ordinarily, doctor, speaking in terms of medical probabilities, if a person has sustained a concussion to the brain and is going to have headaches from the concussion, [106] won’t those headaches ordinarily start within a week of the trauma?

“A. I think normally they would start some after the injury.

“Q. Yes. Well, wouldn’t one ordinarily——

“A. Or at least at the time of the injury.

“Q. Well, they would ordinarily start at least within three weeks, would they not, of the injury?

“A. Well, one would presume that, yes.

“Q. And wouldn’t they, as a matter of fact, ordinarily start, doctor, within three hours of the injury? A. Well, not necessarily so.

(Deposition of Dr. George Teller.)

“Q. No, but just speaking in probabilities?

“A. Probably, I would think one would experience that, yes.

“Q. And when you first examined him and took the history of what happened to him, did you not write down in your notes all of his complaints?

“A. I did.

“Q. And did they not include any headache?

“A. They did not include headache at that time.

“Q. Now, doctor, did you form an opinion at the time of your treatment as to any period of disability which might result to the patient by virtue of a trauma of which he was complaining?

“A. Yes, I did.

“Q. And what was your opinion at that time as to the [107] duration of any disability?

“A. It was my opinion at that time that his disability would be approximately two to three weeks.

“Q. After the trauma?

“A. After being released from the hospital.”

Redirect Examination

By Mr. Vergeer:

“Q. Doctor, your opinion on two to three weeks was just an estimation at that time?

“A. That is correct.

“Q. And it could have been longer, a longer period? A. Yes, within reason.

(Deposition of Dr. George Teller.)

“Q. And do you feel that a month is inconsistent with your initial estimate of two to three weeks?

“A. Well, I think at the time of the estimate two or three weeks or even four weeks is all within the realm of possibility.

“Q. Doctor, Mr. Noteboom’s deposition indicates that immediately following the accident he was in a dazed condition. Would that be consistent with your finding of concussion? A. Yes.

“Q. Was he a co-operative patient throughout the treatment? A. Very co-operative.

“Q. Was he the complaining type?

“A. No, not at all.

“Mr. Vergeer: Thank you very much.” [108]

Recross-Examination

By Mr. Gearin:

Q. “Doctor, counsel asked you if it was a fact that he was in a dazed condition after the accident would be consistent with your finding of concussion. Now, doctor, as a matter of fact, from going over your notes I see that you did not make any finding of concussion. Am I correct in that?

“A. That was a misunderstanding on my part. As far as my records, I had no record of him being in a dazed—that was my, a misunderstanding. I thought you said he had stated he was in a dazed condition.

“Mr. Verger: Yes, that is correct, doctor.

“A. But as far as my findings, I did not have a record of him being in a dazed condition.

(Deposition of Dr. George Teller.)

“Mr. Vergeer: Oh, you stated at the time you saw him he was clear and bright.

“A. That is right.

“Mr. Vergeer: And what I had reference was Mr. Noteboom’s deposition where he described himself as being dazed immediately after the accident without saying how long a period that condition continued.

“A. Yes. He did not describe that to me, however.

“Q. Now, doctor, as a matter of fact, you did not make any finding of concussion, did you? [109]

“A. Not at the time, no, I did not.

“Q. And have you ever made any finding of concussion?

“A. No, I have not seen him since that time.

“Mr. Gearin: That’s all.

“Q. (By Mr. Vergeer): You did have in your history the fact that he struck the back of his head in the cab at the time of the accident?

“A. I did, yes.

“Q. And you ascribed the hematoma that you found in the mid-region of the back of the head to such a blow? A. That is right.

“Mr. Vergeer: Thank you very much.”

The Court: Very well. I think that this is a good time to take our afternoon recess. You are now excused for about ten minutes.

Mr. Vergeer: May I make an offer of proof, please?

The Court: Yes.

Mr. Gearin: Mr. Burton, please, will you take the stand. [110]

ROY BURTON

was thereupon recalled as a witness on behalf of the defendant for the purpose of an offer of proof, and, having been previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Gearin:

Q. Mr. Burton, immediately after the accident, did you hear any exclamation made by the driver of the P.I.E. truck?

A. Yes, he was saying he couldn't get away from it. He kept exclaiming that.

Mr. Gearin: I have no further questions.

Mr. Vergeer: No questions.

Mr. Gearin: That's all, your Honor.

The Court: Couldn't get away from it?

Mr. Gearin: Yes, sir.

The Court: All right. Do you want to change your mind?

Mr. Vergeer: No, your Honor, I think if we should have anything that this man stated about the happening of the accident, we should have all of it. I don't think it would be fair.

The Court: I don't care. There is some question in this, so I will continue with my ruling, but if you want me to——

Mr. Vergeer: No, I think that's correct, your Honor.

The Court: From a technical point of view, I

don't [111] think their showing is sufficient because it is meaningless. Recess.

(Whereupon, a short recess was taken.)

The Court: Call your next witness.

Mr. Vergeer: We will call Mr. Sadoff. [112]

HYMAN A. SADOFF

was thereupon recalled as a witness on behalf of the plaintiff, and, having been previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Vergeer:

Q. Will you state your full name, please?

A. Hyman Sadoff.

Q. And where do you live?

A. 12219 Southwest Lesser Road.

Q. Is that in Portland? A. That's right.

Q. How long have you been a resident of this area? A. For the last twelve years.

Q. And what is the nature of your business?

A. I am in the truck leasing business and truck repair.

Q. Do you have any relationship to Samac, Inc.? A. Yes, I am the president.

Q. Now, Mr. Sadoff, in connection with the affairs of Samac, Inc., you have been in court here and testified today, haven't you?

A. Yes, I have.

Q. Who was the owner of the truck that was

(Testimony of Hyman A. Sadoff.)

being operated by the Converse Trucking Service at that time?

A. The owner of the truck was Samac, Inc.

Q. That's the truck-tractor we are talking [113] about?

A. That's right.

Q. The Samac did not own the trailers?

A. No, sir.

Q. In that connection, was that tractor under any kind of an agreement to Converse Trucking?

A. Yes, it was.

Q. I will ask the bailiff to hand you Samac's Exhibit No. 9, and I will ask you what that is?

A. This is an annual lease to Truck No. 230.

Q. Is that the truck that was involved in this collision?

A. That's right.

Q. How many trucks are operated by Samac?

Mr. Gearin: That's immaterial.

Q. (By Mr. Vergeer): Pardon me, how many trucks does Samac own?

Mr. Gearin: That's immaterial, your Honor.

The Court: I don't know what the purpose of it is. I don't see any object to it.

Q. (By Mr. Vergeer): We will connect it up. How many trucks?

A. Well, at this particular time, five.

Q. All right, at the time of the accident?

A. That's right, five.

Q. How many of them were leased to Converse?

A. Four.

Q. Is that lease the one covering the truck in

(Testimony of Hyman A. Sadoff.)

question [114] and the operation in which it was engaged on the occasion of this accident?

A. Yes, it is.

Mr. Vergeer: We will offer that lease, your Honor.

Mr. Gearin: No objection.

The Court: Admitted.

(Whereupon, Samac's Exhibit previously marked Exhibit 9 for identification was received into evidence.)

Q. (By Mr. Vergeer): When did you last see that tractor immediately before the accident?

A. That was the night of the 6th, approximately 4:30-5:00 o'clock.

Q. The 6th of March, 1956?

A. That's right, '56.

Q. All right. What condition was that tractor in immediately prior to the accident?

A. Good operating condition.

Q. Did you see it after the accident?

A. Yes, I did.

Q. And where did you see it after the accident?

A. Up on top of Willamette Pass, close to the junction there.

Q. Now, there have been a number of pictures introduced and some of these are Samac's Exhibits. You have seen those pictures, have you? [115]

A. Yes, I have.

Q. Do they correctly depict the tractor as it looked after the accident?

A. Yes, they do.

(Testimony of Hyman A. Sadoff.)

Q. What kind of a tractor was this, and tell us about it?

A. Well, it was a 1953 International tractor, 116-inch wheel base, and it was powered with a Cummins' engine and two-speed differential for pulling these trains or duals, as you might call them.

Q. How many speeds in the transmission?

A. There were five speeds on the transmission.

Q. And a two-speed differential?

A. That's right.

Q. So that you could change the speed in the differential from high to low?

A. That's right.

Q. So that altogether you had how many speeds on that truck? A. Ten speeds.

Q. Mr. Sadoff, are you familiar with the reasonable market value of trucks of the type involved in this accident as of the date of the accident?

A. I think so.

Q. Have you bought and sold a number of trucks?

A. Well, I have bought a considerable amount of them. I haven't been able to sell any yet.

Q. You have purchased a number of trucks, however? [116] A. That's right.

Q. And do you know the reasonable market value of that truck as of the time of this accident, before it was damaged? A. Yes, I do.

Q. What was the reasonable value of that truck at that time? A. Approximately \$9,500.

Q. After the accident, do you have any knowl-

(Testimony of Hyman A. Sadoff.)

edge of the market value of that truck after the accident?

A. There was a bid submitted for the salvage.

Q. Well, do you know what the reasonable market value of that truck was after the accident; was it top value that it had immediately after the accident?

A. Well, nothing whatsoever as far as I was concerned.

Q. How about market value, are you talking about market value?

A. Well, there wouldn't be any market value on a piece of wrecked merchandise.

Q. Did you have a bid for it; did someone offer to buy it from you? A. Yes, I did.

Q. And what was the bid you could get for it?

A. \$1,400.

Q. Did you sell it? A. No, I didn't.

Q. Was the truck repaired?

A. Yes, it was. [117]

Q. And in whose shop was it repaired?

A. In my own shop.

Q. Now, at the time was it—what was the nature of the repairs, generally, that were required to that tractor?

A. Well, first off, we released the frame and overhauled the transmission, straightened the differential housing and overhauled the differential. Replaced some tires on it which were cut and damaged and repaired the engine and the front springs, and we also replaced the fuel pump on the motor.

(Testimony of Hyman A. Sadoff.)

if I am correct, and we replaced the cab and superstructure complete.

Q. Was the cab in a condition where it could be repaired? A. No, it wasn't.

Q. Was a new cab of the same identical make and type available? A. No, they weren't.

Q. What sort of a cab did you replace it with?

A. I replaced it with a '48 liner cab.

Q. Is that an improvement? A. Yes, it is.

Q. On the truck, it is an improvement?

A. Yes, it is.

Q. And that cab has a sleeper on it?

A. That's right.

Q. And your former cab did not? [118]

A. That's right.

Q. What is the difference in the value of those cabs?

A. Well, the International cab sold for \$1,300, I believe, at the time; right in that vicinity, and this liner cab sold for \$2,250 stripped at the time.

Q. Yes. How much money was spent; did you spend repairing the truck including the improvement by way of a different cab?

A. Well, in addition to what the bids were, there were approximately an additional \$3,000 spent.

Q. Well, now, you're speaking of some bids, and what were those bids?

The Court: What is the relevancy of that?

Mr. Vergeer: I don't—very well, I withdraw the question. I don't think it's relevant either, your

(Testimony of Hyman A. Sadoff.)

Honor. I would like to know what you actually spent in repairing the truck.

A. Approximately \$8,600.

Q. How much? A. \$8,600.

Q. Is that the money you spent repairing it?

A. That's right.

Q. Now, what happened to your contract with Converse Trucking Service?

Mr. Gearin: I object, your Honor, on the ground and [119] for the reason that the contract does not provide for any specific number of hauls to be made and as a matter of law there can be no recovery for anticipated profits unless a further showing be made which has not been made.

Mr. Vergeer: We are not asking for anticipated profits. We are asking for the damages for the interference with a profitable agreement which we had.

Mr. Gearin: On the further grounds of the objection being, your Honor, that there is no testimony that he rented or tried to rent or could not have rented another vehicle of like type.

Mr. Vergeer: That, of course, is something that counsel can bring out on cross-examination, your Honor.

The Court: Objection sustained.

Mr. Vergeer: Is the Court ruling that we cannot go into the question of the determination of this contract? I don't want—

The Court: I think you can, but you haven't made any kind of a showing here. I think that if

(Testimony of Hyman A. Sadoff.)

you are trying to obtain reasonable value of the loss of use of the truck, you will have to make a better showing than you have so far.

Q. (By Mr. Vergeer): Yes, that may well be, your Honor. All right. How long did it take you to repair the truck?

A. Well, sir, we actually spent the rest of the year on it.

Q. Now, had the truck been repaired—well, of course, [120] you say the parts for it weren't available; is that right? A. Not at the time.

The Court: How much does that truck cost new?

The Witness: \$16,500.

The Court: \$16,500.

The Witness: That's right.

The Court: How old was it at that time?

The Witness: At the time it was wrecked, sir?

The Court: Yes.

The Witness: It was two years and three months old, sir.

The Court: Two years and three months?

The Witness: That's right.

The Court: And you say it cost you how much to fix it?

The Witness: \$8,500, sir.

The Court: Well, you charge yourself labor; is that right? How many men did you have in your shop?

The Witness: At the time there were two men in the shop.

The Court: Go ahead.

(Testimony of Hyman A. Sadoff.)

Q. (By Mr. Vergeer): Very well. Now, what was the—how many miles did this truck run in performance of its contract with Converse Trucking Service?

Mr. Gearin: Objection, your Honor, on the ground, on the same grounds as before. The measure of damages for the loss of use is reasonable rented value.

Mr. Vergeer: Your Honor, our position in this case is, [121] this is not entirely a question of loss of use. Now, I don't know how the Court wants to handle that——

The Court: Where are your authorities?

Mr. Vergeer: We have some authorities here, your Honor.

The Court: All right. You come back tomorrow, and we will look at the authorities.

Mr. Vergeer: Very well, your Honor.

The Court: Give me your brief.

Mr. Crookham: I do not have it finished.

The Court: Objection sustained. You know, this is the time of trial, Mr. Crookham. You have done this time and time before, and I always ask you if you have your authorities. Go ahead, the objection is sustained.

Q. (By Mr. Vergeer): Now, what was the reasonable length of time necessary to repair this truck?

A. Well, if the parts had all been available——

Q. No, no, I am speaking now of the conditions that existed.

(Testimony of Hyman A. Sadoff.)

A. Well, they told me they would have it done in ninety days.

Q. What is the reasonable value of the use of that truck?

A. Per mile, per month, or what?

Q. For the manner in which it was used?

Mr. Gearin: Objection, your Honor, unless the witness first testifies that he rented another vehicle or he tried to and none was available.

The Court: Objection overruled. Go ahead. Do you [122] know what the going rate for a truck of this kind was?

The Witness: To rent one, sir?

The Court: Yes.

The Witness: It was the same thing as I was getting per mile.

The Court: All right.

Q. (By Mr. Vergeer): What were you getting per month for the use of the truck?

A. A little better than \$3,000; \$3,300, I believe.

Q. How many miles a month would the truck run.

A. Approximately 12,000.

Mr. Vergeer: On this contract question, your Honor, I wonder if I might have leave of the Court to submit—I have some authorities here on the matter.

The Court: All right, give them to me. What are your authorities?

Mr. Vergeer: Will you give the Court your citations?

(Testimony of Hyman A. Sadoff.)

Mr. Crookham: The one case we are relying on——

The Court: What are the facts of the case?

Mr. Crookham: I don't have my brief completed, your Honor, but I——

The Court: That's the reason I asked you, because I knew you hadn't read the case. You do that all the time.

Mr. Crookham: I am sorry, your Honor.

The Court: All right. Tell me the facts of the case [123] and tell me the other facts of the other cases upon which you rely.

Mr. Crookham: Well, I am not prepared to do that right now, your Honor.

The Court: Yes. This is the time of the trial. The case has been filed over a year. All right, go ahead. Motion is denied.

Mr. Vergeer: Very well, your Honor.

The Court: Because of a lack of preparedness of the counsel in addition to the other aspects.

Mr. Vergeer: I think you may inquire.

Cross-Examination

By Mr. Gearin:

Q. Mr. Sadoff, you say you spent \$8,500 to \$8,600 in repairing your truck yourself?

A. That's right.

Q. Do you recall when your deposition was taken March 1st, 1957 in Mr. Crookham's office: you were asked this question and you gave this answer? "All right, what was the cost of repairs?

(Testimony of Hyman A. Sadoff.)

Answer: The actual cost to have it repaired was more than any one of the estimates for this particular reason. We have gone a little more extensively into it. We have done more work. Question: What did it cost, approximately? Answer: I would make an approximate figure of \$10,000." Did you so testify? [124]

A. Yes, I did.

Q. Now, is \$7,000—or—is \$8,500 correct?

A. Well, at the time of the deposition it was the same thing as when you asked me of the cost per mile it would take to operate this vehicle. I had no figures in front of me, and after I had checked into the figures at my office as to cost per mile, I also checked into that and that is where I came up from the \$8,500.

Q. You say you had four trucks leased to Converse? A. That's right.

Q. And you made \$3,300 per month per truck?

A. That's right.

Q. So that you have a gross income, Mr. Sadoff, of \$158,400 from Converse. Did they pay you that amount of money?

A. I kind of imagine they did.

The Court: What did you say?

The Witness: I kind of imagine he did.

Q. (By Mr. Gearin): All right. Now, did you try to rent another truck? A. Yes, I did.

Q. Did you go to——

A. I tried to buy one.

Q. And none was available?

(Testimony of Hyman A. Sadoff.)

A. There was one truck at the time that a fellow owned that had leased to Pierce, and he is the manager of their Oakland [125] Branch, and I contacted him on the phone asking him if he would care to sell his truck because that was the only one in town that came up to the same specifications as the one I had. So he told me that he would consider it and think about it, and I could call him back later some time. I called him back within a week, and he said, "No, he would not care to sell it."

Q. Did you try to rent one?

A. Yes, I tried to rent one from Wiedel Trailer & Equipment Company.

Q. Did you try to rent one from United?

A. No, I didn't.

Q. Did you try to rent one from Consolidated?

A. No, I didn't.

Q. All right. Now, as a matter of fact, you had some bids for the repairs of this tractor, did you not?

A. Yes, I did.

Q. And Rowe Brothers' estimate was \$3,800, wasn't it?

A. I believe so.

Q. And International Truck Company was \$3,900, wasn't it?

A. I believe so.

Q. And White was \$5,090?

A. (Witness nods head in the affirmative.)

Q. Now, when you made your adjustment with the Phoenix and Home with regard to your collision coverage, you rounded [126] off the figure of your damages at \$5,769.46, did you not?

A. I believe that's right.

(Testimony of Hyman A. Sadoff.)

Q. And then subtracted from that was your \$1,000 deductible? A. That's right.

Q. Would you say that after this accident the truck had no market value other than junk?

A. Well, that was the bid that was submitted by Miller Truck Parts.

Q. Well, I will have to ask you, Mr. Sadoff, if it's not a fact that it was just nothing but junk when they got through with it? It was a total?

A. Pretty close.

Q. Well, would you answer that yes or no?

A. Yes.

Mr. Gearin: I have no further questions, your Honor.

Redirect Examination

By Mr. Vergeer:

Q. Now, counsel has asked you, Mr. Sadoff, about the Rowe Brothers Rebuilders & Equipment Company bid for \$3,800 and more dollars for repair. Did that bid include all the repair to the truck? A. No, it did not.

Q. Did it include the tires? A. No.

Q. Did it include the motor work? [127]

A. No, it didn't.

Q. Did it include the transmission?

A. No.

Q. How about the differential? A. No.

Q. The steering wheel? A. No.

Q. The frame? A. No.

(Testimony of Hyman A. Sadoff.)

Q. None of those things were included in that bid? A. None whatsoever.

Q. Now, as a matter of fact, the repairs that were bid on by any of these companies were, were any of these companies' bids for complete repairs?

A. No, they weren't.

Q. Did you tell me awhile ago how many miles this truck would run a month on this contract?

A. Approximately 12,000 miles a month.

Q. And how many cents a mile you made?

A. Thirty cents a mile.

Q. How much were the drivers paid, or do you pay the driver?

A. No, I don't pay the drivers. Converse Trucking Service pays them.

Q. And what is the monthly cost of fuel, oil and operating expenses on the truck that you pay and that comes out of your [128] part of this payment?

A. The driver's wages, the Oregon Public Utilities Commission, insurance, health and welfare, I mean, Drivers' Retirement Fund, and Washington State Tax.

Q. I will ask the Clerk to hand you Exhibit No. 11 of Samac, Inc. Perhaps you can refresh your memory from that. Now, can you tell the items that come out?

A. That come out of the thirty cents a mile? Yes, we have the cost of oil. That's fuel oil——

Q. How much would that run a month?

A. \$380.10.

Q. All right.

(Testimony of Hyman A. Sadoff.)

A. And the cost of motor oil with lubricating oil runs \$21.20. Now, the repairs on the tractor, now, all this is based on a 28 day month. The transmission repair is based on an over-all picture of a year and then divided by twelve is \$23.20.

Q. That's the maintenance on the transmission?

A. For one month. Motor repairs for one month is \$100. Differential repairs, \$73; tire chain repairs, \$8; brake lining, \$8; miscellaneous repairs, \$50 a month; wages computed at ten cents a mile, \$1,190.60; tires, \$96.33; insurance, \$12.36; Drivers' Pension Fund, \$30; fuel taxes, \$91.84. Total cost of operation for a 28 day month is \$2,092 and——

Q. Two thousand what? [129]

A. \$2,092.73.

Q. And what is the total income for the month?

A. The total income for the month of 11,906 is \$3,571.80. We also have one more for repair of five cents a mile to pay to the Public Utilities Commission, and I have a total of \$595.30.

Q. Does this come out of this gross income in addition to the figures you have given me?

A. That's right.

Q. And that cuts your net income down to what, per month?

A. The net income per month is \$883.77.

Q. Were you able, under the conditions that existed, that is, regarding the availability of replacement parts, to place this truck back on the road in ninety days? A. No.

Q. Considering the availability problem of re-

(Testimony of Hyman A. Sadoff.)

placement parts, what is the best you could do and did do?

A. Well, the best we did do was take the rest of the year, and we rebuilt it.

Q. And what is the best you could have done?

A. Well, I could have got it out—you mean if the parts were available?

Q. No, I mean under the conditions as they existed?

A. I would have gotten it done in 120 days.

Mr. Vergeer: That's all. [130]

Recross-Examination

By Mr. Gearin:

Q. Mr. Sadoff, you deduct the wages, driver's wages from that amount of 10c a mile, don't you?

A. That's a recommended figure of 10c a mile.

Q. All right. But you don't get 30c a mile, do you? You get \$22 a day and 11c a mile when you are empty? When they are deadheaded, don't you?

A. We have never deadheaded.

Q. Well, I am asking you if the agreement doesn't state that. Remember in your deposition I asked you this question: "Now, can you tell me,—" and I didn't pin you down on one answer, "What would be the reasonable period of time for repairing this rig? Answer: If the parts were available, I would say six weeks should have been sufficient." Did you so testify?

A. That's right.

Q. And on page 16, I asked you this question.

(Testimony of Hyman A. Sadoff.)

“Question: One other question. When you started to repair this, were the parts available? Answer: Most of them were. The ones I wanted weren’t. Question: What were they? Answer: Well, I was going to install a different cab on the truck, which I did. I mean, a different make cab; I was unable to purchase one of those until November of that year.” Did you so testify? A. Yes, I did.

Q. And if you really wanted to get it repaired in a hurry [131] with the same cab on it, you could have done it in five or six weeks, couldn’t you?

A. No, we couldn’t. The cab was obsolete. The cab was out of production.

Q. Where did you try to get a cab?

A. From the maker of the truck, International Harvester.

Q. All right. Did you try to buy another truck?

A. Yes, I did.

Q. Other than the one person that you mentioned? A. Yes, I did.

Q. And you tried one in California, you say?

A. I tried one with the Oakland Branch Manager of Pierce Freight Lines, and I also tried to purchase one from the White Motor Company.

Q. But they don’t make International trucks any more?

A. No, I don’t believe they do, but they were willing to sell me one of their own make at a much higher figure.

Q. In other words, you wanted to get a rig, but

(Testimony of Hyman A. Sadoff.)

you couldn't buy one at a price that you wanted to pay? A. That's approximately right.

Mr. Gearin: I have no further questions.

Mr. Vergeer: I think that's all.

The Court: That's all.

(Witness excused.)

Mr. Vergeer: That's our case, your Honor. [132]

The Court: All right.

Mr. Gearin: Call Mr. Woodworth. [133]

LARRY CURTIS WOODWORTH

was thereupon produced as a witness on behalf of the defendants, and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gearin:

Q. Mr. Woodworth, where do you live?

A. 5455 Southeast 52nd Avenue, Portland.

Q. What is your occupation?

A. Heavy equipment operator.

Q. You mean truck driver?

A. No—now, yes, sir, most of the time.

Q. All right. Now, have you had any experience in the investigation of traffic accidents?

A. Yes, I have.

Q. In what connection?

A. With the Oregon State Highway Patrol.

Q. And did you recognize the officer that testified earlier? A. Yes, I did.

(Testimony of Larry Curtis Woodworth.)

Q. All right. Now, directing your attention to the accident with which we are here involved, were you on the highway about the time the accident occurred? A. I was.

Q. Were you driving a truck at that time?

A. I was.

Q. By whom were you employed? [134]

A. West Coast Fast Freight, Incorporated.

Q. All right. And with reference to the set of doubles of Converse Trucking Service, had you seen those before the accident?

A. I didn't recognize them as such. I was following a truck.

Q. And did that subsequently turn out to be the truck involved? A. Yes.

Q. When had you first picked it up before the accident? A. Pulling Willamette Pass.

Q. And was the other truck ahead of you or behind you?

A. He was—the Converse truck was ahead of me.

Q. And do you recall where the rise is on the Eugene side of the accident? A. Yes, I do.

Q. All right. Before you got to the rise, how far were you behind the Converse rig?

A. Approximately a quarter of a mile.

Q. All right. What was your speed at that time?

A. It varied. Do you mean after we came over the top of the ridge?

Q. No, just before you got to the top of the ridge.

(Testimony of Larry Curtis Woodworth.)

A. Well, approximately fifty miles an hour down the hill and slowed down as I went up the other rise.

Q. All right. When you got over the rise and proceeded to where the accident occurred, did you see the other rig [135] ahead of you, and how far ahead of you was he at that time?

A. Approximately a quarter to a half mile, a little under a half a mile, a little over a quarter mile.

Q. As you—did I ask you who you were employed with now? A. No.

Q. Who are you employed by?

A. John L. Jersey, contractor.

Q. And as you came over the rise, how fast were you going?

A. Between forty-five and fifty miles an hour.

Q. And how far ahead—I asked you that. Now, was your truck or vehicle equipped with any timing or speed recording device?

A. Yes, it was equipped with a speedograph.

Q. All right. And what does a speedograph show? A. At which time, sir?

Q. Well, what does it show with reference to the speed?

Mr. Vergeer: I think the speedograph would be the best evidence, your Honor.

Q. (By Mr. Gearin): I am just asking him what they show.

A. It shows the speed traveled and the time of day and the stops and so forth, and it keeps an ac-

(Testimony of Larry Curtis Woodworth.)

curate check of the speed every minute. It's marked on the graph.

Q. All right. Now, did you see the collision?

A. Yes, I did.

Q. All right. From where you were, could you tell anything [136] about the manner in which it happened?

A. No, I couldn't. There was a lot of snow dust behind the Converse truck, and I did not see the P.I.E. truck at all until after the collision.

Mr. Gearin: Mr. Clerk, will you hand the witness Pretrial Exhibit No. 26, I think it's A? May I see it a moment? The other one, 26-B, please.

(Document handed to witness.)

Q. (By Mr. Gearin): I am handing you Pretrial Exhibit No. 26-B, Mr. Woodworth, and ask you if you can identify that?

A. Yes, I can.

Q. And what is that?

A. This is a speedograph chart for my run from Portland to Klamath Falls on March 6th, 1956.

Q. And does that indicate the speed at which you were traveling immediately prior to this accident?

A. It does.

Q. And what does it show, do you need a magnifying glass?

A. I can read it here.

Q. All right.

A. Approximately forty-three miles an hour.

Q. I see. And had you maintained that speed for some little while before the accident?

(Testimony of Larry Curtis Woodworth.)

A. Yes, and faster and slower, it veered up and down there.

Q. And during this period of time, how did the distance [137] between you and the Converse rig run?

A. Well, when we first started pulling this little raise just before the accident, I was fairly close, and when we broke over the last little hill there, where I could see over the hill, I could see he was a considerable distance ahead of me.

Mr. Gearin: We offer 26-B in evidence, your Honor.

Mr. Vergeer: No objection.

The Court: Admitted.

(Whereupon, Pretrial Exhibit previously marked Exhibit 26-B for identification was received into evidence.)

Mr. Gearin: You may inquire.

Cross-Examination

By Mr. Vergeer:

Q. You tried to pass the Converse rig, did you not?

A. No, I didn't. I never got close enough to pass him. I was—my intention was just in maintaining my speed, and at various times I got up behind him by going up a hill, but that's all.

Q. You were traveling faster than he was as you were coming up the hill; is that right?

A. You mean up the hill?

(Testimony of Larry Curtis Woodworth.)

Q. Right. Now, then, before you got to this last rise, when he reached the top of that last rise and broke over, [138] before going down toward the scene of the accident, how far were you behind him at that point?

A. Oh, a little less than a fourth of a mile.

Q. As you went up that hill—were you loaded?

A. Partially loaded, light load.

Q. What sort of a rig?

A. Semitruck and trailer, 40-foot semirig.

Q. What sort of power?

A. 200 Cummins.

Q. What sort of a load did you have; what kind of material were you hauling?

A. I don't know, general freight.

Q. Now, as you went up the rise, did your speed vary at all? A. Up the last incline?

Q. Yes.

A. From on the level, yes, it came down the hill and then hit the rise.

Q. That's right, so going down the slight rise you would go down faster than you would go up the grade? A. That's right.

Q. And when you got to the bottom of the other grade, the other vehicle was on top of it?

A. That's right.

Q. And then you slowed down as you pulled up the grade?

A. A little, yes, it's just a slight incline. [139]

Q. Then while the other truck was going down the grade, you would be coming up the other side?

(Testimony of Larry Curtis Woodworth.)

A. That's right.

Q. Did you shift down any?

A. Maybe dropped a third of a gear.

Q. A third of a gear, you have a brownie on that truck?

A. Yes.

Q. And what were you driving in?

A. I was in—I don't recall—we had a different truck every trip, probably in fourth direct.

Q. Well, do you have that from recollection or are you guessing now?

A. I am guessing.

Q. I see, all right.

A. To this point, that from the speedograph report we can pretty well tell what it was.

Q. Well, actually had you had any experience with that truck that you know of?

A. I couldn't say that I had. I had probably used it off and on several times. We had a live one every trip.

Q. Now, this speedograph, you don't know how accurate this particular speedograph was, do you?

A. No.

Q. And the speedographs do vary, don't they?

A. They can. [140]

Q. And so you don't claim anything for the speedograph except that that was the speed of the graph in the truck at the time?

A. That's right.

Q. Now, at the time you were employed, you say, by West Coast Fast Freight?

A. West Coast Fast Freight.

(Testimony of Larry Curtis Woodworth.)

Q. And West Coast Fast Freight was then a division of Pacific Intermountain, wasn't it?

A. I don't know whether they had been taken over at that time or not, the name was still West Coast Fast Freight, and we received our pay checks as such.

Q. Yes, but you actually, your truck was owned and operated through Pacific Intermountain at that time, wasn't it? A. I could not say.

Q. May I see the speedograph card, please? Did you have chains on, by the way? A. No, sir.

Q. Did you stop on top of the hill?

A. No.

Q. And you say you had been following this truck coming up the grade, up the Willamette Pass?

A. Yes. Whether it was this one or not, I don't know. There is a lot of turns in that road that you would lose sight of it.

Q. I see. So it might have been another truck that you were [141] following?

A. That's possible.

Q. So if it turned out that this truck in question stopped at the top of the grade and took his chains off, would you say that it was still the truck you had been following?

A. Would you say that again?

Q. If the evidence would show that the truck involved in the collision had stopped at the top of the grade to take its chains off, then would you say that was the one that you had been following?

A. I am not quite clear on your question yet.

(Testimony of Larry Curtis Woodworth.)

Q. Well, all right, suppose that the evidence discloses or will disclose that the truck which was involved in the collision, that is the Converse rig—

A. Uh huh.

Q. —had stopped at the top of the Willamette Pass, had taken its chains off, then would you say that was the truck you had been following?

A. If he had of stopped, I would have caught him.

Q. But you didn't, did you?

A. That's right, there was no truck at the top when I got there.

Q. Did you—if that truck had stopped at the top of the grade, if it had stopped for ten minutes, would you have caught up with it? [142]

A. That's right.

Q. And actually, doesn't this speedograph indicate that you were going somewhat less than forty miles an hour for quite a long time before the accident?

A. Way back pulling the mountain, yes.

Q. Well, no, may I approach the witness, your Honor?

The Court: Yes.

Q. (By Mr. Vergeer): You have marked on the exhibit, "Crescent Lake Junction, help at wreck"? A. That's right.

Q. Does that cover a period of time when you were stopped at the wreck? A. Yes.

Q. All right. Now, then, the speedograph card indicates your speed just prior to the time between

(Testimony of Larry Curtis Woodworth.)

then and Eugene, just prior to the time you reached the accident, doesn't it? A. Right.

Q. And it also shows that when you pulled up the grade it took you a little over a half an hour to pull up that grade? A. Yes.

Q. When you were pulling that grade, you were going, oh, maybe ten, fifteen miles an hour a great deal of the time? A. Correct.

Q. Then just before you reached the scene of the accident where it shows your truck came to a stop, the top indication [143] of speed on this thing shows materially under fifty miles an hour, anyway, doesn't it, between twenty-five—somewhere around in there?

A. I have to look at it under a glass. There is one marked there at fifty.

Q. There is one. You reached fifty miles an hour, that's right, momentarily. A. Yes.

Q. And could that have been coming down the ridge?

A. I think that's just this last knoll before the accident.

Q. Then it drops down to about thirty-five?

A. Well, that's after the accident occurred, I started slowing down.

Q. No, you speeded up after that again?

A. Well, I don't know.

Q. You dropped down to about thirty-five and then you held it a little bit and then you picked up to about forty-three?

A. I couldn't tell without looking at it.

(Testimony of Larry Curtis Woodworth.)

Q. You couldn't? A. No.

Q. Well, in any case, this chart shows what you did? A. That's right.

Q. And as to its accuracy, you don't know whether it's 10 per cent off or not?

A. I couldn't say whether it was off or not. [144]

Q. It is not unusual for them to be off, is it?

A. We accept them in the company, and you are allowed certain rules to run with, and we run exclusively by speedograph.

Q. But you do know, it isn't unusual for them to be off to some extent?

A. To vary somewhat?

Q. Yes. And you didn't actually see the accident. Now, may I have——

A. I did see the accident.

Q. Well, I mean, you couldn't tell what happened? A. No, but I mean, I saw the impact.

Q. You could see an accident happening down there? A. Yes, that's right; I saw it.

Q. I wonder if I might—you reached the scene of the accident then shortly after it occurred then, didn't you? A. Yes, directly after that.

Q. And did you see the diagram the police officer drew? A. I did.

Q. Did that correctly show the position of the vehicles before they were moved?

A. That's correct.

Q. Now, I want to hand you, through the courtesy of the bailiff, Exhibit No. 23-G.

(Testimony of Larry Curtis Woodworth.)

Mr. Gearin: Which one is that?

Mr. Vergeer: It's the picture showing the P.I.E. truck [145] front; 23-G, and ask you if the skid-marks that show deeply gouged across way of the highway from the left to the right were there when you reached the scene of the accident or whether you recall looking at them?

A. I don't recognize these marks.

Q. (By Mr. Vergeer): You don't recall whether they were there or not?

A. No, I don't.

Q. Had that truck been moved when the picture was taken?

A. The tanker?

Q. Yes.

A. To the best of my knowledge, I don't believe it had.

Q. It looked just the same to you?

A. That's right.

Mr. Vergeer: That's all.

Redirect Examination

By Mr. Gearin:

Q. What type of rig did you have, Mr. Woodworth?

A. A semitruck and trailer.

Q. All right. And that's—you had a tractor and one trailer?

A. 40-foot box, yes.

Q. Now, as you started down on the last slope toward the accident scene, was the truck ahead of you, the one that was involved in the collision, was that going fast or slower than you were?

(Testimony of Larry Curtis Woodworth.)

A. I would say it was going approximately the same speed [146] I was.

Mr. Gearin: I see. I have no further questions.

Mr. Vergeer: That's all.

(Witness excused.)

Mr. Gearin: Mr. Clancy. [147]

SHERMAN E. CLANCY

was thereupon produced as a witness on behalf of the defendants, and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gearin:

Q. Mr. Clancy, where do you live?

A. 5114 Northeast Hoyt.

Q. And how long have you lived in this area?

A. I have lived there at that place about sixteen years.

Q. With whom are you employed at the present time? A. Interstate Freight Line.

Q. By whom were you employed last March 7th?

A. Pacific Intermountain Express.

Q. All right, sir. Now, were you driving a P.I.E. tanker truck and trailer that was involved in this accident? A. Yes.

Q. Where did you start your run?

A. I started my run from Portland to Klamath Falls.

Q. And what day was that?

(Testimony of Sherman E. Clancy.)

A. That was March the 6th.

Q. And from Klamath Falls, did you take another rig back?

A. Yes, I brought the same one back.

Q. I see. And did you stay over and get your required sleep? A. Yes.

Q. All right. Now, as you approached the scene of the [148] accident, what speed were you traveling?

A. I was traveling about thirty-two miles an hour.

Q. I see. And you have had occasion to check your speedograph here today?

A. Yes, uh huh.

Q. And what, if anything, did you do in regard to the speedograph with reference to Officer Hazelwood? A. What did I do?

Q. Yes.

A. Well, he asked me how fast I was going, and I said I don't know, and so then he said, "Well, we will open up the clock and look," which he did.

Q. And what, if anything, did he do with the speedograph?

A. He signed it. He put his name down and the time and the date.

Q. I see. Now, had you seen the Converse rig, Mr. Noteboom's rig, prior to the time that you got close to the accident's scene? A. Yes.

Q. All right. Could you give us any idea of the speed at which he was traveling as he approached the accident's scene?

(Testimony of Sherman E. Clancy.)

A. Well, I would say roughly around forty-five miles an hour.

Q. I see. And will you tell us in your own words then, just exactly what happened as the two vehicles approached [149] each other?

A. Well, I saw him when he came over the hill or this grade; he came over this——

Q. How far would that be away?

A. Oh, I would have to say approximately a half mile; I am not sure on my distance, but——

Q. At that time, on which side of the road were you traveling?

A. I was on the right side.

Q. At any time did your vehicle, or any portion thereof, get on the wrong portion of the road?

A. No.

Q. Perhaps I have interrupted you. Will you, in your own words, describe what happened as the two vehicles approached each other?

A. Well, he was—as this Converse was coming towards me, I was over as far to the right as it was possible for me to get, and I was crowded right up to the snowbank and in order, as he come close, in order for me to avoid hitting him, or him hitting me, I turned to the right as far as I could.

Q. All right. Now, how far apart were the two vehicles when you turned to the right?

A. Well, I would say from about 75 feet—50 to 75 feet.

Q. All right, and then what transpired after that?

A. Well, then there was this crash.

(Testimony of Sherman E. Clancy.)

Q. Were you able to get the front end of your rig over to the right without impact? [150]

A. The front end without impact?

Q. Yes. A. Yes.

Q. All right. Now, at the time that you started to turn to the right, where was the Converse or Mr. Noteboom's rig with reference to the center of the highway?

A. Well, he was on over towards my side.

Q. All right. Now, after you observed that and you started to turn to the right, did you watch what happened to his rig after that?

A. No. No, I didn't, you mean just at the time of the accident?

Q. Well, just before and the last when you turned to the right in the snowbank?

A. The tractor was by me.

Q. I see.

A. And I didn't notice then.

Q. Now, after the accident, were the vehicles in about the approximate position that the police officers have placed them there?

A. Well, yes, No. 3 was a little bit back, angled.

Q. Would you turn that around so the jury can see it to show what you mean?

A. Well, I don't know. I don't mean to change it.

Q. Well, give us your best idea of the way you now remember [151] it looked to you.

A. Well, this tractor here (indicating) was more over on this angle (indicating).

(Testimony of Sherman E. Clancy.)

Q. I see, and then——

A. And this (indicating) was blocking the highway this way, this was back this way (indicating).

Q. More of a "U" shape?

A. More of a "U" shape to it, yes.

Q. All right, sir, and were the distances between the two vehicles about the same?

A. You mean across here (indicating)?

Q. No, lengthwise, north and south on the road, or east and west, I think they have a distance there of 127 feet?

A. Yes, uh huh.

Q. All right. If you will resume the stand, please, Mr. Clancy. Now, Mr. Clancy, what portion of the Converse rig or Mr. Noteboom's rig come into contact with what portion of either your truck or your trailers?

A. Well, it would be the left side.

Q. I see. Of which portion of the rig?

A. Of the Converse, well, the left side of the tractor.

Q. Came in contact with what portion of your rig?

A. With the left rear tank and driver.

Q. Was your trailer damaged at all?

A. Yes, it was. [152]

Q. Whereabouts?

A. I think that the air line was broken, there was an air line broke and the lights and things like that was damaged on it.

Q. I mean, was there any physical contact between any of the Converse or the Noteboom rig?

(Testimony of Sherman E. Clancy.)

A. No.

Q. And your trailer? A. No.

Q. At the time of the accident, at the time of impact, where was your truck with reference to the center of the highway?

A. I was on the right-hand side.

Q. How long did you stay at the scene of the accident after it occurred?

A. I was there from 1:30 in the morning until I believe it was 12:00 noon.

Q. I see. What was the weather out there at the time of the accident? A. Cold.

Q. All right. When you say it was cold, was it below freezing?

A. It was below freezing, yes.

Q. What was the condition of the surface of the highway with regard to whether or not it was slippery?

A. It was—well, it was not like a dry snow, it was—of course, it all depends, I would guess, on how fast you were [153] driving.

Q. Did you have chains on. A. No.

Q. How long a period of time had you been driving with snow on the highway?

A. You mean on this—

Q. Yes.

A. Oh, I don't know, you mean this particular time?

Q. Yes, do you have any memory on that?

A. Well, I don't know just what you mean.

(Testimony of Sherman E. Clancy.)

Q. Well, before the accident, how long in miles or time was it that there had been snow on the highway?

A. Well, it was icy at Klamath Falls and then as I got up, I believe it was—I would have to say south of Chemult.

Q. Did you at any time feel it necessary to put on your chains? A. No.

Mr. Vergeer: I think I object to that.

Mr. Gearin: Well, you may inquire.

Cross-Examination

By Mr. Vergeer:

Q. Mr. Clancy, at the time of the accident, then, I take it—by the way, was your truck loaded or empty? A. I was empty.

Q. And you had been—you took a load to Klamath Falls and dumped it there and came back empty; is that it? [154]

A. That's right.

Q. All right. Now, at the time of the accident, I take it then you had turned to your right before the accident occurred? A. Yes.

Q. And was your truck in a straight line when the accident occurred? A. Yes.

Q. In a straight line? A. You mean——

Q. But somewhat to the right?

A. That's right.

Mr. Vergeer: I think that's all.

Mr. Gearin: That's all, Mr. Clancy.

The Court: Call your next witness.

(Witness excused.)

Mr. Gearin: Your Honor, I don't have any more testimony at this time. I relied on counsel's statement that we would go into the afternoon. I have one more witness.

The Court: You told me that you would be over in the middle of the afternoon, and he said it would be tomorrow, and I said that it would not be. You have been trying cases for many years over here, and you know I don't believe what counsel says.

Mr. Gearin: I have made arrangements, your Honor, for Mr. Ogden of Consolidated Freightways to be here at 3:30 this [155] afternoon, and I called him and told him that it would be tomorrow morning. If your Honor wants me to rest, I have nothing more to give, except ask for a postponement.

The Court: How long will he take?

Mr. Gearin: He will take about two or three minutes, and the purpose of his testimony has to do with the availability of other trucks for rental during this period.

The Court: Well, I will let you do it.

Mr. Gearin: Thank you, sir. I could have had him here.

The Court: Then do it after this.

Mr. Vergeer: If it doesn't make any difference, your Honor, I want to put Mr. Noteboom on again for one question.

The Court: All right, you may do that after he puts on his witness. Recess until tomorrow morning.

(Whereupon, court was adjourned until 11:20 of the following day.) [156]

Thursday, March 21, 1957, 11:20 A.M.

The Court: I didn't realize that we'd be so busy this morning, but I do want to tell you that earlier today we streamlined the issues, and I think we are going to be through about noontime. Call your witness.

Mr. Gearin: Mr. Ogden, please. [157]

E. B. OGDEN

was thereupon produced as a witness on behalf of the defendants, and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gearin:

Q. Mr. Ogden, do you live here in Portland?

A. I do.

Q. What is your occupation, sir?

A. I am vice-president in charge of equipment and development for Consolidated Freightways.

Q. How long have you been in the trucking business?

A. About twenty-five years.

Q. Does Consolidated Freightways operate trucks and trailers upon the highways?

A. They do.

Q. All right. Will you tell us, please, what a set of doubles is?

A. A set of doubles, sir, is a combination of a semitrailer which is pulled by a tractor and behind

(Testimony of E. B. Ogden.)

the first semitrailer is another trailer, a semitrailer which has a removal set of front wheels or a dolly.

Q. In the case of a set of doubles, what is the motive power, what do you call that?

A. A tractor.

Q. All right. Does Consolidated Freightways operate doubles [158] or trains upon the highway?

A. They do.

Q. About how many motive units does Consolidated operate?

A. Close to 500 power units and about 1,800 trailers.

Q. Now, with reference to the power units or tractors for a set of doubles, are those available for rent or lease in the area, say, contiguous to Portland, Oregon?

A. They are.

Q. What is the fact with reference to their availability, say, from the spring of 1956?

A. I would assume that they were available then, too.

Q. All right, sir.

Mr. Vergeer: I will move——

The Court: What do you mean, "I assume"?

The Witness: Well, I would say, yes, they would have been.

Q. (By Mr. Gearin): Is there a standard or what is the rental value, if you know, of a tractor capable and suitable for pulling a set of doubles upon the highway, and what was it with reference, say, to 1956?

A. Well, we have a leasing company and if we

(Testimony of E. B. Ogden.)

were to rent a tractor to pull a set of doubles, our rate would be approximately \$89 a week plus 13c a mile.

Q. The cost of operation and maintenance would be borne by whom?

A. By us as the lessor. [159]

Q. The question of fuel?

A. Fuel would be borne by whoever leased it from us.

Q. I see. And driver's wages?

A. By whoever leased it from us.

Q. I see. Now, the reference has been made about Freightliner; what is a Freightliner Corporation, what do they do?

A. What is the Freightliner Corporation?

Q. Yes.

A. They are a company engaged in building of tractors and/or trucks in the City of Portland.

Q. All right. They are built here in the City of Portland?

A. Yes, sir.

Q. What connection, if any, is there between Freightliner Corporation and Consolidated Truck Freightways?

A. They were a wholly owned subsidiary of Consolidated Freightways.

Q. And were the Freightliner parts available in the City of Portland in the spring of 1956?

A. Yes, sir.

Q. Does that include cabs? A. Yes, sir.

Q. I have no further questions. Oh, one other

(Testimony of E. B. Ogden.)

question. Does this model that we have here, this morning, fairly depict what a set of doubles is?

A. I would say so, yes, sir. [160]

Q. All right. And this (indicating) being the first unit, being the tractor, and the one trailer and the second trailer?

A. Yes, sir.

Mr. Gearin: That's all.

Cross-Examination

By Mr. Vergeer:

Q. Let's see, Mr. Gearin represents Consolidated, doesn't he?

A. I couldn't answer that, sir.

Q. You couldn't?

A. No, sir, I never met the man until this morning. I didn't even know him.

Q. Isn't it a fact that he has represented Consolidated in many cases?

A. I can't answer that. I don't know.

Q. You have not gone to court with reference to Consolidated work?

A. I have been in the past, years ago.

Q. Years ago. Now, Mr. Ogden, you said something about Freightliner equipment being available in Portland?

A. Yes.

Q. Is that the same as an International tractor?

A. Well, it's not the same make, no, sir.

Q. It's not, is it?

A. It's not the same as International. It's a Freightliner.

Q. That's right. There is a difference. Now,

(Testimony of E. B. Ogden.)

how about— [161] was there an International cab available in the City of Portland or anywhere else, for that matter, in March of 1956?

A. I couldn't answer that question.

Q. Isn't it a fact that the International people are now out of business?

A. International Harvester out of business?

Q. Do they make International tractors at this time?

A. Well, yes, International Harvester makes tractors, if that's what you are referring to.

Q. But do they make a tractor without a sleeper?

A. Yes.

Q. Are you sure they still make that?

A. Am I sure they are still making them?

Q. Yes.

A. No, I will have to say that I would assume that International is making them without a sleeper.

Q. You don't know?

A. No, sir, not International.

Q. Now, on this rental business, you say you would charge for a 200 horsepower diesel tractor suitable for this kind of work, you say you would charge \$89 per week plus 13c per mile and the person who rents the equipment would pay the driver; would pay for the fuel and the ordinary operating maintenance?

A. No, we would stand the maintenance.

Q. This is repairs to the truck that you would take care of? [162]

A. That's right.

Q. But you wouldn't—what I am getting at is

(Testimony of E. B. Ogden.)

greasing and all that sort of thing is being done by the renter, isn't that right?

A. No, we would take care of all maintenance.

Q. All maintenance? A. For that price.

Q. The fuel and lubricants only are supplied; is that right?

A. It would include motor oil also and the grease for the chassis, but it would not include the fuel burnt by the engine.

Q. All right, fine. Now, how about insurance and Public Utility Commission plates?

A. It would include insurance but not Public Utility Commission plates. It would include an Oregon license.

Q. What kind of insurance would it include?

A. I am not quite positive what the insurance would cover. My job is not the leasing of trucks. I am in the development of trucks. We have a man whose sole duty is leasing trucks, and when you ask me the insurance, I am not positive.

Q. You don't know about that? A. No.

Mr. Vergeer: Thank you, Mr. Ogden. I think that's all.

Mr. Gearin: Thank you, sir.

The Court: That's all.

(Witness excused.) [163]

Mr. Gearin: I would like to offer into evidence the tachographs and all the photographs, the map which is our Exhibit No. 24, photograph being Exhibits 23-A to L, inclusive, tachograph card Exhibits 26-A and B, and Exhibit 27 and Exhibit 28, the tractor service report.

The Court: Tractor service report?

Mr. Gearin: Yes, sir.

The Court: What is that?

Mr. Gearin: Well, Mr. Crookham asked me for it during the deposition, your Honor, and I just thought I'd offer it.

The Court: I don't think that any of this is material since our discussions of this morning. I thought we were going to submit the case on one specification?

Mr. Gearin: Well, the photographs would be—might be of assistance and the map.

The Court: Photographs, what would they show, who is on the wrong side of the road?

Mr. Gearin: They are just for the assistance of the jury, your Honor.

The Court: Well, I don't care, the photographs are admitted, but not the tachographs.

Mr. Gearin: Well, your Honor, I would like to use the tachograph of Mr. Woodworth for the purpose of impeachment.

The Court: All right, it's admitted for that purpose.

Mr. Vergeer: And how about the map? No one has seen [164] it and I don't know what is on the map. I don't know how it would be helpful.

The Court: Show it to him.

Mr. Crookham: I have seen it, your Honor, and it shows nothing of the snow or anything. It's just a profile as it would be of the summer.

Mr. Gearin: And it shows the profile up and down.

The Court: Show it to Mr. Vergeer.

Mr. Vergeer: Well, I would invite the Court's attention to the map. I fail to see how it would be the least bit helpful. In fact, it would be hopelessly confusing, and I don't think it's material so I will make an objection on that ground.

The Court: Let me take a look.

(Document handed to the Court.)

Mr. Vergeer: That map will have to be explained, your Honor, the thing is very complicated.

The Court: Objection sustained. It's a little too complicated for me.

Mr. Gearin: We rest, your Honor.

Mr. Vergeer: We will call back Mr. Noteboom for a question, your Honor. [165]

DONALD H. NOTEBOOM

was thereupon recalled on rebuttal as a witness on behalf of the plaintiff, and, having been previously sworn was examined and testified as follows:

Direct Examination

By Mr. Vergeer:

Q. Mr. Noteboom, when you came up the Wilamette grade that night, were there chains on your truck?

A. To the top of the hill, yes.

Q. To the top of the hill? A. Yes.

Q. What did you do at the top of the hill?

A. I stopped and took them off.

Q. And then continued to the scene of the accident? A. Yes.

(Testimony of Donald H. Noteboom.)

Q. Tell me something, there is one other question that I wanted to ask you, and that is about the tracking of the rear wheels of the train.

A. Tracking?

Q. Yes, how they track?

A. Directly in line with the very front wheel of the truck.

Q. They follow all the time, do they?

A. Perfect.

Q. In that respect, are they any different from the rear wheels on a semitrailer? [166]

A. They will track better than what they will on a semitrailer.

Q. And they will track within inches of the front wheels; is that right? A. Yes.

Cross-Examination

By Mr. Gearin:

Q. Mr. Noteboom, when you have a train, once in a while they will jackknife?

A. You just have to know how to drive them, yes.

Q. And you were loaded with crackers, as I understand? A. Yes, sir.

Q. That is a relatively light load?

A. A fairly light load.

Q. And when you have a bend between the tractor and the trailer No. 1, then you have a bend in trailer No. 2, don't you? A. Yes, sir.

Q. And if you're on ice and going downhill at a high rate of speed and you put your brakes

(Testimony of Donald H. Noteboom.)

on, you might have some little waving in the back one of the trailers and you might jackknife?

A. Very seldom.

Q. But it's possible? A. Possible.

Q. And you could be—the tractor could be coming down [167] an icy stretch of highway and the tractor would be over here and the trailers could be over here (indicating), couldn't they?

A. Not if you're driving right, sir.

Q. And if you're not driving right, it would happen? A. It's possible.

Q. How long is that set of doubles of yours, about 60 feet? A. Approximately.

Q. Well, it wouldn't be over that anyway, would it? A. The law says not.

Q. And between, for example, between a truck and a trailer, a full truck and trailer, you have the brakes on the trailer being operated by air hoses between the two? A. Yes, sir.

Q. All right. And if I mention a triple valve, will you know what I am talking about?

A. Yes, sir.

Q. Now if I——

Mr. Vergeer: I object, your Honor, this is not cross-examination. I don't know exactly what counsel is after.

Mr. Gearin: May I make him my witness for this question?

Mr. Vergeer: I thought counsel had closed his case.

The Court: Well, I think you opened up quite a bit of this yourself.

(Testimony of Donald H. Noteboom.)

Mr. Vergeer: Very well. [168]

Q. (By Mr. Gearin): And the braking of the air hose between any one of these units, either on a set of trains, set of doubles or a train or a truck and trailer will have what effect upon the brakes?

A. Well, it would set them up.

Q. I mean right now? A. Yes.

Mr. Gearin: I thank you, sir. I have no further questions.

Mr. Vergeer: That's all. Thank you.

The Court: All right.

(Witness excused.)

The Court: That is your case?

Mr. Vergeer: Yes, your Honor, we will rest.

The Court: How long do you want?

Mr. Vergeer: Well, it might take twenty minutes or so.

The Court: It's 11:30 now. The issues have been very much limited and these men will tell you about it themselves. I don't have to tell you right now. Do you have a copy of this interrogatory?

Mr. Vergeer: I do, sir.

Mr. Gearin: I do, too.

The Court: I think we will be through by 12:30 at the outside, everything, and then you can go out to lunch at the expense of the government rather than yourself, or do you prefer to quit at twelve o'clock? [169]

(No response.)

The Court: Go ahead. Don't talk too long. I am not going to give you any limit. None of these men are long-winded, I know them.

(Whereupon, closing argument was made by Mr. Vergeer.)

Mr. Gearin: If the Court please, as Mr. Vergeer has told you, he gets to argue twice. So I am going to try and argue a short time, but I want you to bear with me, if you will.

One of the questions that was not asked by Mr. Vergeer, or which he did not answer, was why did Mr. Clancy take off for the snowbank. He admits he did it. He said he had to do it. Mr. Noteboom said that when they were 60 or 75 feet away that the oncoming truck turned. He didn't—he stated he turned into the snowbank. The answer to that is very obvious. The reason that Mr. Clancy had to turn into the snowbank was because of this set of doubles with the light load being driven at a speed of forty-three miles an hour on an icy highway was having trouble staying on its side of the road. Now, you will recall Mr. Noteboom testified in substance that if you don't drive them properly you are going to have this (indicating) over here (indicating) and this one here (indicating) and something else, and you remember this was going downhill for Mr. Noteboom and it was uphill for us. [170] The grade was very slight, however.

Now, it didn't track, if it's being properly operated. if it's not it won't track, and I suggest to

you that from all the evidence, considering both of these drivers, that one, all of a sudden, has to turn to the right. There is only one reason for it, instinct of self-preservation. He had to do it.

Now, if that is the case, there can be no question but what Mr. Clancy was free from negligence. That's what we are talking about, what made him turn over. Now, one other thing is important, I mean, we try to cover all the facts and just give you the facts because the people on the jury know what is right and what is wrong as well as the lawyers. One of the things is that the air hose—they testified that if our air hoses were broken or damaged between the rigs, that would set the brakes and immediately. The photographs to which counsel referred and has marked, no one at the scene of the accident identified them, the state police officer, the trained men who were there didn't have any comment at all to make about these particular tracks and, frankly, I don't know what can be drawn from them; what they mean. So I think that we can dispense with that. It appears, however, from the measurements that there are—there was 12—11 feet, 7 inches to the side, and if Mr. Clancy had to take to the snowbank in order to avoid [171] Mr. Noteboom, you certainly couldn't hold him for the fact that his trailer may have swung out, if it did swing out. Certainly that was not his fault, that he had to swing into the snowbank.

Now, the officers who testified, the trained men, some of them have been on the force a considerable

period of time, cannot and did not establish the point of impact. Notwithstanding the officer's testimony of the right rear wheel of the third unit of the train which they said was on the side. Now, that is very significant when you bear in mind Mr. Noteboom's testimony this morning that unless you drive it properly, this thing won't track properly, and it is very significant that the police officers, even with this evidence which does not appear from their notes would not establish the point of impact. Now, I ask you this. If those tracks that they described were made by the right side wheels of the Converse rig, then the accident would have had to occur on their side of the road, and the State Police Officers would have made a determination of that fact, which they did not do, which indicates again that this right rear was back here (indicating). That track had nothing to do with where the front end was when it chased Mr. Clancy into the snowbank.

Now, as far as the witnesses are concerned, there was Mr. Woodworth, he contradicted Mr. Noteboom. He has no axe to grind in this case. He says that there was no truck [172] taking its chain off, and he said that when he came over he was following the same speed behind the rig that was involved in the wreck because he could see the snow flurries of the track of the wheels and that speed, according to the tachometer was forty-three miles an hour. Mr. Noteboom says it's something else again, and so those are all the facts I want you to consider. Mr. Vergeer tries to say that we are

doing the best we can to get out from under. But here we have definite positive proof by the tachograph that Mr. Noteboom was going faster than he said he was going at the time.

Now, Mr. Burton, he was some considerable distance away; he said that, "We were on our side at all times." He said that looking past us he could see the Converse rig approach and that it looked like he was on his side of the road, too. So, as far as what happened at the time, all we know is that he says that we turned to the right, the same as Mr. Noteboom and the same as Mr. Clancy said, which brings us back to the same question that I mentioned, and that is: why was it Mr. Clancy had to take to the shoulder of the road and into the snow-bank? Why was it? You have two apparently capable professional drivers and one is going downhill with the rig that's been described with the light load, the other is coming uphill and one has to turn off. It's very obvious that he had to get out of the way. Now, talking about the preponderance of the evidence, I want to [173] comment briefly upon that, and I am going to turn it in with the question of what really happened. How do we find out what the truth is? I want you to bear this in mind, if you will, please. As far as the plaintiff's are concerned, Mr. Samac and Mr. Noteboom, when they brought him here to Portland to be examined by Dr. Davis made statements; one, that he was unconscious. Dr. Teller at Eugene said he had no history of being unconscious. That the

man was mentally alert. Mr. Noteboom told Dr. Davis that his attorney got him to say that he had headaches right after the accident. Dr. Teller had no history of the headaches. In the nineteen days that he was seen, he didn't complain of it. Then they claim a concussion which Dr. Teller did not find. Now, can't we take what Mr. Noteboom says with a grain of salt? Now, the same thing applies to Mr. Sadoff. He says that he tried to rent another vehicle. Did he bolster that up with any testimony other than his own? We had testimony here that other rigs could be rented. He said, "I couldn't get the parts." It's significant that the three business firms that made bids on this didn't have any question about parts or the replacing of the cab. Mr. Samac tells us first of all that the cost a week or two ago, said it cost \$7,000 to repair. Now, he wants to put a little more gasoline on the bonfire and said, "No, it cost \$8,600 to repair." [174] Can we, perhaps, take his testimony with a little grain of salt? Because we know at Consolidated Freightways that a tractor that would have done the job was available and could be rented, but he didn't rent it. He didn't try to rent another vehicle. They were available. I mentioned another firm Jobitz Truck Rental, did you try there? He says, no, he wanted to get a rig in California, but the price wasn't right. Now, so when we consider the claims that are made as damages, and I think we should view them in the same light as we view their testimony as to how this accident happened. Mr. Vergeer says that Mr.

Clancy dozed. There is no testimony of that at all, but we do have this testimony of Mr. Noteboom when I asked him on cross-examination yesterday, I said, "You looked up and all of a sudden the trailer was there? He said, "Yes." He looked up from what? What was he doing? Was he paying attention? Was he looking to his side of the road or did he make Mr. Clancy duck into the snow-bank?

Now, they make a point at us, and the reason I am talking about their damages is that they have stipulated as to our damages, and we have stipulated to Converse damages and this is—you only get to determine half of this case. You only get to determine what caused the accident. Was it Mr. Noteboom or was it Mr. Clancy or was it an unavoidable accident? You answer those questions, and that's all. [175]

But sometimes, you know, just in case you point your finger at either fellow, remember they pointed their finger to us and said we caused the damages to Mr. Samac's rig. Why didn't he call someone else? I asked Mr. Samac if he didn't have a bid from Rowe Brothers, but did he suggest using Rowe Brothers? First, I asked him if he didn't have a bid from International. He says, "Yes." Did he call International? I asked him if he didn't have a bid from White Motor Company and he said, "Yes." Did he call somebody? No, he didn't. So let's take those claims with a little grain of salt, and let's take also their claims that we were on the wrong side of the road with a little grain of salt. Evidently they don't make any claim that

our tractor was, because we didn't make such a claim because it wasn't damaged and you will have the photographs here. It would be the next to the last one. Bearing in mind that the brakes were set immediately upon the impact, now, there is physical evidence that I don't think any member of this jury can overlook. How can they, in good conscience, say that we caused the accident when the front of our rig was driven into the snowbank in order to avoid Mr. Noteboom. Bearing in mind again, please, that Mr. Noteboom had a light load of crackers. He was going at a speed and we have caught him up on one statement, 47 miles an hour, and for a trained driver, you can tell pretty close how fast you are going with a light load, and with this [176] type of vehicle, it's almost like a snake because you have motion here (indicating) and motion here (indicating) and motion up here (indicating). Bearing in mind it's light, it's downhill and it's icy and he is going at a pretty good clip, did he keep that under control; did he force us over? The answer must be yes.

Now, bearing just a little bit further on the loss of use, he said five or six weeks would be enough, but I couldn't get the parts, and I asked him what parts and he said, "I had to get a cab. I wanted something else that had a sleeper, but I couldn't get it." The man here states that they make those Freightliner trucks right here in Portland. Those cabs were available.

Now, another little thing that you can catch them

up on; Mr. Vergeer said you don't deduct liability insurance for the lease of the rig. Well, when Mr. Sadoff was giving you his figures, he ran off the figures of five hundred and some odd dollars for liability insurance, so you can see that it's not all, we have to dig in and try to catch them up here to determine what really happened and what the damages are.

Bearing in mind that the statements that Mr. Sadoff admitted ran from \$3,800 to \$5,090, and when Mr. Sadoff made his settlement with the insurance companies that are here represented by Mr. Clapperton, he cut off the figures of [177] damages at \$5,700, and he settled with them on that case, then to the \$5,800 the \$1,000 deductible which is \$4,769.47. So, you see, in one case he is getting something from his insurance company and then he comes in trying to get it from us and almost doubles it. Now, I ask, who is putting their best foot forward here, and I am going to ask you again, in determining this one question that you will have a chance to answer, what caused Mr. Clancy to pull off on the side of the road? Determine that by looking at all of the evidence in the case, every little bit of it. See on which side the truth lies. See from your practical experience. Those of you who have driven; those of you who have been on rides; those of you who have seen trucks. Take in every little bit of the evidence that is all in this case, and answer that question, please. What caused Mr. Clancy to turn into the snowbank? There is only one answer. The reason

he did, he had to because if he didn't he would have been the one that would have had the personal injuries, and he would have been the one that would have been hurt, and we ask that you answer the question whether or not Mr. Clancy was negligent in the negative because in all fairness I don't see that he had anything to do with this accident other than he was there, and he was trying to protect his life when he pulled into the snowbank. Thank you.

(Mr. Vergeer made his closing argument.)

INSTRUCTIONS TO THE JURY

The Court: Ladies and gentlemen of the jury, as counsel has told you, this case arose out of a collision which occurred between a truck operated by Converse Trucking Company and one operated by the Pacific Intermountain Express Company on March 7th, 1956, on Oregon State Highway No. 58 near Crescent Lake Junction, and as the result of this accident various claims were asserted. Some by Converse against the Pacific Intermountain Express Company and by Mr. Noteboom, others by the Pacific Intermountain Express Company against the Converse Trucking Company and these have all been consolidated for trial at one time, and it has been further simplified by stipulations of the attorneys so that only a few questions of fact will be decided by the jury. Other questions, primarily questions of law, will be taken care of by me on the basis of your findings.

Now, you have heard all the evidence and it is now my privilege to instruct you as to the law. Just

remember, that you are not to single out one instruction alone in taking the law, but you must consider it from the instructions as a whole, and as I told you previously, you are to follow my instructions and regardless of any opinion you might have as to what the law ought to be, it would be a violation of your sworn duty to answer those questions on any other basis than those laid down by my instructions.

Now, this claim is predicated on negligence. [179] Negligence is defined as a doing of an act which a person of ordinary prudence would not have done under the same or similar circumstances, or the failure to do an act which a person of ordinary prudence would have done under the same or similar circumstances. It is a requirement of due care. In this case, however, the standard of due care has been determined for us, because there is a statute involved, and wherever there is a statute, that determines the standard of care of a reasonably prudent person.

I think both counsel have told you that the real crux of this problem is who was on the wrong side of the road. Mr. Noteboom and Converse say that the defendant was guilty of negligence. I think, specifically, they say that it failed to keep its truck and trailer on the right half of the highway. The law enacted by the State of Oregon reads as follows: "Drivers of vehicles proceeding in opposite directions shall pass each other to the right. Each giving to the other at least one-half of the main traveled portion of the roadway as nearly as possible." And

I think it's also true and there is a correlary law to the effect that you're supposed to keep at the extreme edge of your right side.

In this particular case, I am going to ask you to answer a number of interrogatories, and the first interrogatory is, "Was Sherman E. Clancy, the driver of the [180] Pacific Intermountain Express Company's truck and trailer guilty of negligence?" And you will answer that question, depending upon whether you find that he was operating his truck and trailer on the wrong side of the road.

That doesn't mean at the second of impact, because it is admitted that at the moment of impact, a portion of his trailer was on the wrong side of the road and it was necessarily true because the nose of his truck was in the snow. I want to say that there is no question that Sherman Clancy's truck was on the wrong side of the road at the moment of impact because at that point a portion of the trailer had gone over the center line of the highway. But was that condition excusable? There is a rule of law which says that if an operator of a vehicle, without negligence on his part, is faced with a sudden emergency in the operation of his vehicle, he is not expected to exercise that cool and deliberate judgment which subsequent investigation suggests would have been the most prudent course. Therefore, if you find that Mr. Clancy, just before the accident was faced with a sudden emergency and that he turned his truck to the right and into the snowbank which resulted in the trailer going across the center line of the highway and colliding with the truck which

Mr. Noteboom was operating, Mr. Clancy would not be guilty of any negligence, if you find that he was faced with a sudden emergency and that he acted with [181] reasonable care under such stress. This is true, even though subsequent investigation might suggest that he could have avoided the accident had he not engaged in this maneuver.

Of course, his driving his truck into the snowbank with the resultant consequences of having the trailer extend over the center line is excusable, if in fact, the truck of Mr. Noteboom was proceeding in the opposite direction over the center line, that is, on his side of the line. You have heard the evidence, and it will be up to you to determine whether Mr. Clancy was, in fact, negligent at the time and place of the accident. That means immediately before the accident occurred.

The next question is: "Was such negligence the proximate cause of the accident?" Proximate cause is probable cause, it is that cause which in direct sequence without any efficient intervening cause produced the accident and injury. I don't think that will be any problem. If you found that one of these trucks was on its right side of the road and a collision occurred, the driving on the wrong side of the road would be the proximate cause of the accident. I think everybody will concede that. Isn't that true, Mr. Gearin? Well, what is it?

Mr. Gearin: Well, I was confused, your Honor, by that. [182] I think that the test is who was on the wrong side of the road period, is the best way I know of expressing it.

The Court: Then you don't want to know the proximate cause?

Mr. Gearin: No, sir, I don't think so.

The Court: Proximate cause is obvious, it seems to me.

Mr. Vergeer: That's right, your Honor.

The Court: We will cut out proximate cause. It's admitted that if the one party was on the wrong side of the road, and the accident occurred, it was the proximate cause as a matter of law. The third question is, "Was Donald H. Noteboom guilty of negligence which caused or contributed to the accident?" There again, you have to determine where Donald Noteboom was immediately prior to the accident. If you find that he was driving down the highway with a portion of his train on the wrong side of the road, then he would be either entirely at fault or, if you found that both trucks were on the wrong side of the road and a collision occurred, then his conduct would have contributed to the accident.

I might say that, with reference to the first question, was Sherman E. Clancy, the driver of the Pacific Intermountain Express Company truck and trailer guilty of negligence, it's up to the defendant Pacific [183] Intermountain Express Company to prove that allegation by a preponderance of the evidence, and the preponderance of the evidence means the greater weight of the evidence. The greater weight of the evidence does not necessarily mean testimony by the greater number of witnesses, but it means evidence that is more convincing by reason

of the credibility that you give the witnesses or by reason of other evidence that has been introduced. In this case, therefore, if the evidence on the guilt of Sherman E. Clancy is evenly matched or inclines toward the position asserted by the defendant Pacific Intermountain Express Company, you must answer that interrogatory in the negative. That is, you must answer it "No."

The plaintiff must prove by a preponderance of the evidence that he was negligent in order to answer that question in the affirmative. But that's not true, as far as the interrogatory which reads, "Was Donald H. Noteboom guilty of negligence which caused or contributed to the accident?" If the evidence is evenly balanced on that, you would also answer that in the negative, because on that one the defendant would have the burden of proof.

Now, the second set of questions is almost identical to the first set of questions, but it relates to the conduct of the defendant Donald H. Noteboom.

In other words, the second set of questions relates to the claim of the Pacific Intermountain Express Company [184] against the Converse Trucking Company, and the first question is, "Was Donald H. Noteboom, the driver of Converse Trucking Service's truck and trailer, guilty of negligence?" And on this allegation, the Pacific Intermountain Express Company has the burden of proof. And the same rules that I laid down for you in connection with the first set of questions are equally applicable here.

Then the next one is, "Was Sherman E. Clancy guilty of negligence which caused or contributed to

the accident?" On that one, the Converse Trucking Company has the burden of proof. After you have answered those questions, you will come to the question of what damages did Donald H. Noteboom sustain by reason of the injuries he suffered in the accident, and in assessing damages, you should take into consideration the injuries he sustained and the pain and suffering which he has endured and will in the future endure, if you find that he has and will endure pain and suffering, and you may also take into consideration his medical and hospital bills.

In this case, there was evidence introduced that he incurred \$171 in hospital and medical services, and, therefore, you should allow him such sum as you believe reasonable for medical services, not exceeding the sum of \$171, and he has also made a claim for \$540 which he represents to be the amount of wages he lost as a result of the accident. In determining the amount of damages, you [185] may allow him the amount he lost in wages, not exceeding the sum of \$540, and these two sums are to be allowed in addition to a sum for general damages, and the test of general damages, as I have laid it down for you, is such sum as will adequately compensate him for the pain and suffering that he has endured in the past and will endure in the future.

All of these three sums are to be put in that one blank space. In connection with the claim of Samac, you are instructed that the measure of damages is the difference in the value of this vehicle immediately before and immediately after the accident. The

amount that was actually expended in the repair of the vehicle is some evidence of its value immediately before and immediately after the accident, but it is not the true measure of damages, because you must take these two figures. There is testimony that immediately before the accident the truck was worth \$9,500 and immediately after it was worth \$1,400. So in any event, you may not allow more than \$8,100 damages to the truck itself, although you may believe that it was worth less or that the salvage or value immediately afterward was higher than the \$1,400.

In addition to the damage to the truck itself, there is a claim of loss of use of the truck, and under the laws, one of the compensable items of damages to a truck is the reasonable value of its use during the time that it [186] would reasonably be necessary to repair the same. And that is for you to determine. You will recall that the plaintiff's testimony was that it was valued at \$883 a month, and he claims that a maximum of 120 days or a period of four months which it was laid up in order to be repaired, and so if you find, you are to find the loss of use, but you cannot allow more than \$3,532 on this claim. Of course, here again, you may find that it was actually less.

Now, the direct testimony of any witness to whom you give full credit and belief is sufficient to establish any issue in this case. Every witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which a witness testifies, the character of his testimony or by evidence

affecting his character or motive or by contradictory evidence. You should carefully scrutinize the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tended to indicate whether the witness is worthy of belief. Consider each witness, his intelligence, motive, and demeanor and manner while on the stand, consider also any relation each witness may bear to either side of the case, the manner in which each witness may be affected by the verdict and the extent to which, if at all, each witness is either supported or contradicted by other evidence.

Inconsistencies or discrepancies in the testimony [187] of the witness or between the testimony of the different witnesses may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or transaction may say or hear differently, and innocent misrecollections, particularly as to speed, distance and time, like failure of recollection is not an uncommon experience. In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy was the result of an innocent error, which it usually is. If you find that the principals of truth fail to be outweighed as to any witness, you will give the testimony of that witness such credibility, if any, that you think it deserves. If you find that a witness has testified falsely in any one material part of his testimony, you should look with distrust upon the other evidence given by such witness, and if you find that any witness has testified falsely, it will be your

duty to disregard all evidence given you by such witness, unless corroborated by other evidence which you do believe.

Now, you will have with you in the jury room, as I said, this form of verdict. These are interrogatories as well as the exhibits. Please answer each one of these interrogatories, and remember that in order to answer any interrogatory it must be by a unanimous vote. In this court, all verdicts are unanimous and, therefore, to each interrogatory [188] it must be unanimous, and that brings us to the interrogatory relating to damages. The amount of damages may not be effected in any mechanical manner. In other words, it has been known that some juries, in order to have an easy way of figuring damages, asked each of the jurors to set down the amount he or she believes should be allowed in damages. Those are added up to a sum and then divided by twelve, and then the amount is figured that way. But that's against the law, you cannot do it. Discuss the amount of damages among yourselves and arrive at a figure which is mutually satisfactory, but don't do it by agreeing in advance to some mechanical method.

Now, this verdict is to be signed only by the foreman, and, therefore, I want to admonish the foreman, whoever he or she may be, to make sure that the answers represent the unanimous opinion of each of the jurors before it's signed.

Is there anything that I omitted that you think I should give, I will ask Mr. Vergeer?

Mr. Vergeer: Well, I don't believe so, your

Honor; I was wondering about the regular emergency instruction. I wonder whether the Court included the negligence on the part of the person being fixed?

The Court: I don't understand.

Mr. Vergeer: Well, I didn't hear the Court say that.

The Court: I don't understand what you mean. [189]

Mr. Vergeer: Well, what I was getting at, of course, is that the emergency doctrine is only applicable if the person that seeks the use of it did not bring about the circumstances through any act of negligence on his part, and I didn't hear that part of it.

The Court: Well, I didn't say so, and I don't recall having said so.

Mr. Vergeer: I did, if a person is without fault on his part.

The Court: That's right. I recall that. The emergency doctrine is only applicable in case the person who was faced with an emergency is without fault at that particular time. If a person is on the wrong side of the road, for example, and is faced with an emergency, this doctrine of exoneration will not apply to him.

Mr. Vergeer: That's all I have, your Honor.

Mr. Clapperton: May I say a word, your Honor?

The Court: Yes.

Mr. Clapperton: In this case, the evidence is undisputed that there were \$4,600 or \$4,700 paid by insurance companies which I represent.

The Court: Yes.

Mr. Clapperton: And I just ask that you instruct the jury that they should not deduct that amount from any amount of damages they find. [190]

The Court: Well, there was no discussion of that and the jury can disregard that remark, too. I told you how to determine damages. You are not interested in legal liability. I have already told you that I am going to determine what judgment should be rendered, and the fact that the insurance company paid or didn't pay \$4,600 or any other sum is absolutely immaterial to any issue that you are called upon to determine. The fact that they did give \$4,600 wouldn't mean that you should raise or lower it or answer a question yes or no because I am going to take care of that particular problem myself.

Mr. Clapperton: Thank you.

Mr. Vergeer: I would like to make my objections in the absence of the jury, your Honor.

The Court: Yes, I just thought if I had——

Mr. Gearin: No, your Honor, except with regard to our instructions No. 4-c and d, with regard to the item of damages, your Honor overlooked that.

The Court: Tell me what they are.

Mr. Gearin: One, minimization of damages and it has to do with the loss of use in the event of total loss.

The Court: I don't think I have to tell you again that the amount to be awarded for loss of use depends upon the time it would reasonably take to repair the vehicle and the man can't drag his

feet and wait for a year or two [191] or any other period of time more than is reasonably necessary to make the repairs, and if in this case you find that six weeks or two months was an adequate time within which to make repairs, obviously that would be the only period of time during which he would be entitled to loss of use. I am going to deny the other request that you make. All right, if there is no other objections—is there any other objection?

Mr. Gearin: I'd like to make some in the absence of the jury.

The Court: All right.

(In the chambers out of the presence of the jury the following proceedings were had:)

Mr. Gearin: The Pacific Intermountain Express objects to the Court's instructing the jury it was admitted or that there was no question but what our truck was on the wrong side of the road at the time of the accident. Mr. Clancy said he didn't get on the wrong side at any time. The measurements so show that after the accident and after the vehicles came to rest they were some 11 feet, 7 inches from each other, and that makes it——

The Court: Oh, I didn't—I thought you had admitted it and by the very statement of how the accident happened, he nosed the truck into the snowbank which in fact caused the [192] trailer to jackknife and go across the center line.

Mr. Gearin: Well, we are at cross-purposes. I

don't recall any such matter, and I would hate to think that the jury had.

The Court: Well, I am going to tell the jury that you didn't admit it.

Mr. Vergeer: Yes, I would be all for that.

Mr. Gearin: And then Pacific Intermountain excepts to the failure of the Court to grant our request to withdraw from the consideration of the jury the question of loss of use because the Samac didn't rent another vehicle and there was testimony by Mr. Sadoff which said that it was a total wreck afterwards.

The Court: All right, those are rejected. The latter ones on the ground that it was apparent that the truck was not a total wreck, that it was, in fact, repaired, and that it was repaired for less than a new one would have cost.

(The following proceedings were had in open court in the presence of the jury:)

The Court: Ladies and gentlemen, I made one comment upon the evidence which was not intended to be a comment and apparently I was working away here on some instructions, and I didn't hear some of the testimony. I stated to you that I thought it was admitted that at the moment of the accident that the plaintiff Intermountain Express Company [193] truck, or at least a portion of the trailer was on the wrong side of the road. I have been now informed that there is no such admissions and it is the contention that at no time during the accident was any portion of the Pacific

Intermountain Express Company truck on the wrong side of the road, and anything I said to the contrary is to be disregarded by you as to that point.

I think we have taken a little longer than I anticipated, and I suggest that before you start deliberating on this case that you go out to lunch. Swear the bailiff.

(Bailiff was sworn by the Clerk of the Court.)

(Whereupon, the jury retired.) [194]

State of Oregon,
County of Multnomah—ss.

I, William A. Beam, an Official Reporter Pro Tempore of the above-entitled court, do hereby certify that I reported in stenotype the foregoing cause, and that my notes were reduced to typewriting under my direction, and that the foregoing transcript, pages 1 to 194, both inclusive, are a full, true and correct record of all instructions given and matters set forth herein had on the trial of said cause and of the whole thereof.

Witness my hand as Official Reporter Pro Tempore this 23rd day of October, 1957, at Portland, Oregon.

/s/ WILLIAM A. BEAM,
Official Reporter Pro
Tempore.

[Endorsed]: Filed October 25, 1957.